Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

KAREN MILLER,
Petitioner,

v.

ALLDATA CORP., and ROBERT WEIFFENBACH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's renewed motion for judgment as a matter of law must be granted when it discharges a plaintiff employee who admittedly engages in repeated acts of conduct that the employer views as violating its anti-harassment policy.

2. Whether it is reversible error for a trial court to refuse to instruct a jury that in the pretext analysis, its inquiry is not whether an employee *in fact* engaged in the alleged misconduct for which she was discharged, but whether the employer acted in *good faith* and *honestly believed* that the employee was discharged because of her conduct.

3. Whether it is reversible error for a trial court to refuse to allow an employer to amend its answer to raise the "after-acquired evidence" defense and present evidence at trial that the plaintiff had engaged in misconduct *at the time of her discharge* from employment.

PARTIES TO THE PROCEEDING

Petitioners

The Petitioners are ALLDATA CORPORATION, a foreign corporation with its principal place of business in Elk Grove, California, and ROBERT WEIFFENBACH, an individual citizen of the United States residing in Colorado (hereinafter "ALLDATA" and "WEIFFENBACH," respectively). Both Petitioners were Defendants in the United States District Court for the Eastern District of Michigan and Appellants in the United States Court of Appeals for the Sixth Circuit.

The Petitioner, ALLDATA CORPORATION, is a subsidiary of AutoZone which holds 10% or more of its stock. The Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

Respondent

The Respondent, KAREN REED MILLER (hereinafter "MILLER"), is an individual citizen of the United States residing in the Eastern District of Michigan. MILLER was the Plaintiff in the United States District Court for the Eastern District of Michigan and the Appellee in the United States Court of Appeals for the Sixth Circuit.

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The opinion of the United States Court of Appeals for the Sixth Circuit on the merits was not recommended for full-text publication and is reproduced in App. A at 1a. The order and judgment of the United States District Court for the Eastern District of Michigan is unreported and is reproduced in App. B at 23a. The decision of the Court of Appeals denying the petition for rehearing *en banc* is unreported and reproduced in App. C at 26a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on July 6, 2001. A timely petition for rehearing *en banc* was denied by that court on August 29, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

42 U.S.C. Section 2000e-2, Title VII of the Civil Rights Act of 1964

> It shall be unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex.

29 C.F.R. Section 1604.11(d), Equal Employment Opportunity Commission Regulation

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

California Government Code Section 12940(j)(1) and (3), California Fair Employment and Housing Act

> It shall be an unlawful employment practice . . . (j) (1) [f]or an employer . . . or any other person, because of . . . sex . . . to harass an employee . . . . Harassment of an employee . . . by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to

prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

* * *

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

California Government Code Section 12940(k), California Fair Employment and Housing Act

It shall be an unlawful employment practice . . . (k) [f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

Michigan Compiled Laws Section 37.2103(i)(*iii*), Elliott-Larsen Civil Rights Act

(i) Discrimination because of sex includes sexual harassment . . . [which] means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

***

(*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or

creating an intimidating, hostile, or offensive . . . employment . . . environment.

STATEMENT OF THE CASE

A. On September 13, 1996, WEIFFENBACH Hired MILLER As A Sales Representative at ALLDATA.

ALLDATA is a corporation with its headquarters in Elk Grove, California. ALLDATA sells a product that consists of computerized information used in the repair of automobiles. ALLDATA employs over 100 employees in the United States, including approximately 15 sales representatives who usually work out of their homes in various parts of the United States and Canada. ALLDATA's Vice President, WEIFFENBACH, hired and supervised ALLDATA's sales representatives, including MILLER. WEIFFENBACH resided in Colorado. MILLER resided in Michigan.

In January 1995, MILLER had been terminated from Mitchell Corporation, a competitor of ALLDATA, for not making her sales quota. In 1995, MILLER went to work for a 'training company" before she contacted WEIFFENBACH and stated that she "was looking exactly for the VAR-type situation" she had performed at Mitchell Corporation. In response to her inquiry, WEIFFENBACH informed MILLER that ALLDATA did not have an opening for her.

In September 1996, WEIFFENBACH contacted MILLER and informed her that he was "looking for someone to do VARs" at ALLDATA. WEIFFENBACH also told MILLER that her "primary function" would be to manage ALLDATA's existing Value Added Reseller (VAR) accounts. After discussing a starting salary of $62,500.00, WEIFFENBACH provided MILLER with a formal offer

letter of employment. MILLER signed the offer letter on September 13, 1996.

At the outset of her employment with ALLDATA, MILLER was provided with various documents, including ALLDATA's anti-harassment policy and a Confidentiality Agreement. At no time during or after her employment did MILLER read ALLDATA's anti-harassment policy. The Confidentiality Agreement MILLER signed memorialized that as a condition to being offered employment at ALLDATA, MILLER acknowledged that she would be furnished with "confidential information, materials and records" and that "upon the termination of this Agreement . . . [she] shall at once return all confidential information to the Company and thereafter refrain from using or disclosing to third parties such secret or confidential information."

B. In September 1996, WEIFFENBACH Verbally Reprimanded MILLER After He Observed Her "Touching" ALLDATA Employee Terry Bushbach And Directed Her To "Stop Hugging People."

In September 1996, MILLER attended an ALLDATA training session in Atlanta, Georgia. Terry Bushbach was an ALLDATA sales representative who sold the ALLDATA product in his geographical territory. While they were in Atlanta, MILLER "touched" Mr. Buschbach on several occasions, making him feel "uncomfortable." Walking back from a lunch or dinner, WEIFFENBACH observed MILLER exchanging hugs or rubbing the shoulders of Mr. Buschbach. On the same day that WEIFFENBACH observed such physical conduct between MILLER and Mr. Bushbach, he "chided" Mr. Bushbach and warned him to cease any physical conduct with MILLER. MILLER testified that WEIFFENBACH also "verbally reprimanded" her and directed her to "stop hugging people."

C. In October 1996, WEIFFENBACH Verbally Warned MILLER After ALLDATA Employee Kerry Keller Complained That Her Unwelcomed Physical Conduct Toward Him Was "Possibly Harassment."

In October 1996, MILLER attended a training session in Elk Grove, California, with other ALLDATA employees. ALLDATA sales representative Kerry Keller described how he "met" MILLER the day before the ALLDATA meeting as follows: "some woman sits down beside [my] chair, throws her arm around me, has her leg dropped across the top of mine and just starts talking to the rest of the guys like nothing is going on." Mr. Keller was "shocked" by MILLER's conduct and the "sexual overtones" attendant thereto and made a point to "stay separated" from her.

At the ALLDATA sales meeting the following day, Mr. Keller observed MILLER "massaging and rubbing the shoulders" of other employees. Mr. Keller discussed his observations of MILLER's conduct with other employees and the consensus was that "if one of us had done that to a female employee, we'd be subject to termination like that."

Several days after the training session concluded, Mr. Keller sent WEIFFENBACH an email wherein he stated that he "wished to express concern over the actions of Karen Reed Miller at our meeting in Elk Grove . . . ." After detailing his observations of MILLER's unwelcomed physical conduct toward several other ALLDATA sales representatives, Mr. Keller stated in his email to WEIFFENBACH that he considered MILLER's conduct "very unprofessional and possibly harassment." Mr. Keller further stated in his email to WEIFFENBACH that MILLER was becoming a "liability" to ALLDATA. In response to Mr. Keller's email, WEIFFENBACH assured him that he would "address it." MILLER admitted that without revealing Mr. Keller's identity, WEIFFENBACH stated to her that he had to "warn her again about this touching."

D. In November 1996, WEIFFENBACH Informed ALLDATA Human Resources Director Karlyn Oberg Of Mr. Keller's Complaint Regarding MILLER's Conduct, Resulting In The Issuance Of A Written Warning To MILLER Threatening Her With Termination If She Again Engaged In Physical Contact Other Than A Business Acceptable Handshake.

Ms. Karlyn Oberg was ALLDATA's Human Resources Director who was employed at ALLDATA's Elk Grove, California facility. Sometime in November 1996, WEIFFENBACH informed Ms. Oberg of the complaints Mr. Keller had made to him regarding MILLER's "touching" of Mr. Keller and other ALLDATA employees.

WEIFFENBACH also made Ms. Oberg aware of MILLER's "habit of touching and being too close and being too familiar with other employees." Ms. Oberg, who had written ALLDATA's anti-harassment policy, concluded that MILLER had violated ALLDATA's anti-harassment policy and advised WEIFFENBACH to have "a more emphatic conversation . . . and send her the documented conversation so that it would be as formal as possible. . . ." In the only other instance of sexual harassment reported to management at ALLDATA, the employer had discharged a male harasser, Roger Brandt. Although WEIFFENBACH was not aware of the circumstances behind Mr. Brandt's discharge, Ms. Oberg had been involved in the decision to terminate his employment after he failed to heed a written reprimand directing him to cease conduct ALLDATA viewed as sexual harassment.

On November 19, 1996, MILLER admitted that she received a memorandum from WEIFFENBACH directing her, *inter alia*, to "[refrain] from any physical contact other than a business acceptable handshake or similar activity." The written reprimand further informed MILLER that "[if]

the Company receives another similar complaint, further disciplinary actions will result up to and including termination . . . ." After receiving the written reprimand, MILLER telephoned WEIFFENBACH to inquire "why he waited six weeks" to give her the memorandum, but MILLER conceded that nothing WEIFFENBACH had written was rescinded during their conversation. MILLER assured WEIFFENBACH that she would "respect his wishes." Further, MILLER took the threat of termination contained in the written reprimand "seriously."

E. In December 1996, MILLER "Hugged," Grabbed, Rubbed And Slapped The Butt" Of Various ALLDATA Employees At A New Hire Training Class, Resulting in ALLDATA Trainer Mark Gunnerson Complaining To WEIFFENBACH About MILLER's Conduct.

Despite her professed belief that she had "corrected [her] habits" after receiving the November 19, 1996 reprimand from WEIFFENBACH, the following month, December 1996, MILLER attended a new hire training class where she admittedly "hugged," "grabbed" and "rubbed the shoulders" of various ALLDATA employees. MILLER further conceded that she "very easily" might have "slapped" ALLDATA employee Jeff Ambrose "on the butt." One evening after the new hire training class, MILLER put her hand on ALLDATA employee Rene Young's leg, startling him.

On the fourth or fifth day of the class, several employees complained to Mark Gunnerson, ALLDATA's National Training Manager, that they felt "uncomfortable with regard to her touching them." Mr. Gunnerson telephoned WEIFFENBACH in Colorado and reported to

him that several employees had objected to MILLER's conduct including one employee who stated "if any of us had touched a female employee of Alldata repeatedly like she was touching us, we'd be terminated for harassment." WEIFFENBACH advised Mr. Gunnerson to talk with MILLER and "direct her to stop."

F. Beginning In Early 1997, WEIFFENBACH Requested And Later Received Several Documented Complaints Regarding MILLER's Physical Conduct Toward ALLDATA Employees.

In January 1997, Mr. Gunnerson telephoned WEIFFENBACH to again express his concerns about MILLER's disruptive and inappropriate conduct at the December training class held in Elk Grove, California. WEIFFENBACH informed Mr. Gunnerson that if he wanted him to address complaints regarding MILLER with her, WEIFFENBACH needed to have the complaints documented.

In late February or early March 1997, WEIFFENBACH informed Ms. Oberg that he had received additional complaints regarding MILLER's engaging in the same type of touching conduct of which she had been warned verbally and in writing. Ms. Oberg told WEIFFENBACH to investigate and get back to her.

WEIFFENBACH requested written statements from those individuals who had indicated they would document their concerns about MILLER's conduct. In response to a request from Mr. Keller, ALLDATA employee Mike Smith prepared a detailed letter dated March 1, 1997, setting forth numerous examples of MILLER's "VERY UNPROFESSIONAL" conduct (emphasis in original). Mr. Smith further memorialized his comment to other employees "that if any one of us had been putting our hands on Karen

like she was doing, that she would probably turn us in for sexual harassment."

On March 12, 1997, Mr. Gunnerson e-mailed a written statement that he had prepared to WEIFFENBACH memorializing the complaints of several ALLDATA employees that MILLER "repeatedly touched them in such ways as to make them very uncomfortable." In his memorandum to WEIFFENBACH, Mr. Gunnerson reiterated the comment made by Mr. Smith to other ALLDATA sales representatives that "If I were to touch a female ALLDATA employee the way she was touching me and the other guys, I'd be out of a job." On March 14, 1997, Mr. Keller re-sent his October 1996 e-mail regarding MILLER's unwelcome touching of ALLDATA employees to WEIFFENBACH.

G. On March 13, 1997, WEIFFENBACH And Ms. Oberg Concluded That MILLER's Employment With ALLDATA Must Be Terminated Because She, Like Former ALLDATA Employee Roger Brandt, Continued To Violate ALLDATA's Anti-Harassment Policy After Being Directed To Cease.

In March 1997, WEIFFENBACH again contacted Ms. Oberg to report that the complaints he had received about MILLER were "supported." After reviewing "the whole process," Ms. Oberg and WEIFFENBACH agreed that they had "no choice but to terminate MILLER." Ms. Oberg's conclusion that the termination of MILLER's employment was appropriate was based on her understanding of ALLDATA's written anti-harassment policy, the fact that former ALLDATA employee Roger Brandt had been discharged when he failed to heed a written admonition to cease certain inappropriate conduct and on her belief that she could be held individually liable under California law if a lawsuit was brought by an ALLDATA employee alleging

that he or she was subjected to sexual harassment from MILLER after Ms. Oberg was made aware of MILLER's unwelcomed and continuous touching of ALLDATA's employees. In the only other instance of sexual harassment reported to management at ALLDATA, the employer had discharged the male harasser, Roger Brandt. Although WEIFFENBACH was not aware of the circumstances behind Mr. Brandt's discharge, Ms. Oberg had been involved in the decision to terminate his employment after he failed to heed a reprimand directing him to cease conduct ALLDATA viewed as sexual harassment.

In a three-way conversation on March 13, 1997, MILLER was informed by WEIFFENBACH and Ms. Oberg that she was being terminated from her employment for repeatedly engaging in the inappropriate touching of employees and subjecting ALLDATA to potential liability. MILLER suggested that a lesser form of punishment be imposed on her and promised to "sew her hands in her pockets." MILLER's gender was not mentioned in the conversation and both WEIFFENBACH and Ms. Oberg testified that MILLER's gender did not play any part in their decision to terminate her employment.

H. MILLER Failed And Refused To Return The Equipment And Confidential Information Entrusted To Her By ALLDATA At The Time She Was Discharged Or Any Time Thereafter.

By letter to MILLER dated March 14, 1007, WEIFFENBACH reminded her that "the ALLDATA demonstration equipment (unit #fc009127), Toshiba 425CDT Satellite Pro laptop (and all accessories including port replicator, modem and briefcase), software, all ALLDATA files and/or contracts, unused airline tickets and all other related items should be returned to Headquarters in Elk Grove, California via Federal Express overnite delivery

immediately." By letter dated April 3, 1997, Ms. Oberg again reminded MILLER of her obligation to return "all Alldata Corporation property in your possession, including all demonstration equipment and a Toshiba Laptop and accessories. As of this date, this equipment has not been received . . . . " MILLER never returned the computer or any other information or equipment entrusted to her to ALLDATA.

At trial, MILLER admitted that that she would continue to "massage employees' necks and shoulders at meetings who had not asked her to do so, . . . put her hand on their knee, . . . and slap another employee on the butt," if she were still employed at ALLDATA.

REASONS FOR GRANTING THE WRIT

POINT I

AN EMPLOYER'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW MUST BE GRANTED WHEN IT DISCHARGES A PLAINTIFF EMPLOYEE WHO ADMITTEDLY ENGAGES IN REPEATED ACTS OF CONDUCT THAT THE EMPLOYER VIEWS AS VIOLATING ITS ANTI-HARASSMENT POLICY

A. The Decision Of The Sixth Circuit Exposes An Employer To Liability For Taking Corrective Action Required By Law.

It has long been settled that federal law imposes an affirmative obligation on employers to take appropriate corrective action to do whatever is necessary to end unlawful harassment in the workplace and prevent said conduct from recurring. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); *Tompkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044, 1049 (3rd Cir. 1977). An employer with actual or constructive notice of alleged unlawful sexual harassment *must* investigate the alleged misconduct and *must* take appropriate remedial action. *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

Conduct between co-employees that constitutes sexual harassment will result in liability to an employer where the employer knew or should have known of the harassment and failed to take appropriate corrective action. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983). Title VII of

the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee because of that individual's "sex." 42 U.S.C. Section 2000e-2. By federal regulation, the Equal Employment Opportunity Commission has set forth the standard that an employer will be held liable for acts of sexual harassment between co-employees where "the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). Numerous states, including California where ALLDATA has its headquarters, have codified the standard for employer liability in the case of co-worker harassment. *See* California Government Code Section 12940, subd. (j)(1) and (3).

In *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 148 (2000), this Court held that when entertaining a motion for judgment as a matter of law, a trial court should "review all of the evidence in the record" and cautioned that "there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."

In the present case, the Sixth Circuit acknowledged, "MILLER does not dispute that she engaged in unwelcome physical contact with her male co-employees, nor that ALLDATA reprimanded her for doing so." (Appendix at 11a.) The Sixth Circuit's opinion, however, fails to acknowledge that because MILLER *admitted* to engaging in the acts of conduct that her employer viewed as harassment, she is unable, as a matter of law, to prove pretext and judgment for the Petitioner therefore was warranted under *Reeves*. *See Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997) and *Pierce v. Commonwealth Life Insurance Co*, 40 F.3d 796 (6th Cir. 1994) (plaintiff who admitted engaging in conduct the employer believed was violative of its anti-harassment policy is unable to show

proffered reason was pretextual). Incredibly, the Sixth Circuit failed to consider the undisputed "evidence" that ALLDATA had discharged Roger Brandt, a *male* employee who had engaged in inappropriate conduct, after he had been warned in writing of termination if he did not cease conduct that it believed violated its anti-harassment policy. More incredibly, the Sixth ignores the "evidence" provided by MILLER that if she were still employed by ALLDATA *she would continue* to massage employees' necks and shoulders at meetings who had not asked her to do so, . . . put her hand on their knee and slap another employee on the butt.

MILLER was employed by ALLDATA for less than six months. During MILLER's relatively short tenure, ALLDATA and WEIFFENBACH took all steps necessitated by the circumstances and as required by law to end the harassment and insure a workplace free of harassment. As soon as ALLDATA and WEIFFENBACH acquired knowledge of MILLER's unwelcome physical conduct toward Mr. Bushbach during the first week of her employment, WEIFFENBACH *verbally reprimanded* her and directed her to stop hugging people. The following month, when WEIFFENBACH received a complaint from Mr. Keller that categorized MILLER's conduct as "very unprofessional and possibly harassment," he again *verbally warned* her against "touching" her co-workers. WEIFFENBACH then *reported* MILLER's conduct to ALLDATA's Human Resources Director, Karlyn Oberg. WEIFFENBACH then issued MILLER a *written reprimand* directing her to refrain from any physical contact other than a professional handshake and threatening her with possible termination if ALLDATA received a similar complaint. Despite said warnings, MILLER continued to engage in the unwelcomed touching of ALLDATA employees before, during and after business meetings. After additional complaints about MILLER's "touching" other ALLDATA employees were brought to WEIFFENBACH's attention, and after he

obtained written statements from eye witnesses to MILLER's conduct, he and Ms. Oberg concluded in good faith that MILLER's employment at ALLDATA had to be terminated.

The Sixth Circuit's decision in this case conflicts with the authoritative decisions of every other United States Court of Appeals that has held that an employer will not be found liable to any employee who is discharged for engaging in conduct the employer believed in good faith amounted to sexual harassment. *See, e.g., Cronquist v. City of Minneapolis*, 237 F.3d 920 (8th Cir. 2001); *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993); *O'Connor v. DePaul University*, 123 F.3d 665 (7th Cir. 1997); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991); *Sloan v. Boeing Co.*, 105 F.3d 669 (10th Cir. 1997) and *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1987). The Sixth Circuit's opinion is also contrary to the opinions of the highest courts of several states. *See Cotran v. Rollins Hall International*, 17 Cal.4th 93, 8 P.2d 412, 69 Cal.Rptr. 2d 900 (1998) and *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 901 P.2d 693 (1995).

The opinion of the Sixth Circuit failed to "review all of the evidence in the record" in reaching its decision to affirm the trial court's denial of the Petitioners' motion for judgment as a matter of law. To the extent that the Sixth Circuit relied upon its decision in *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (1994) to circumvent or avoid the requirements of *Reeves*, its decision is flawed and should be reversed.

B. The Decision Of The Sixth Circuit Deprives An Employer Of The Affirmative Defense Fashioned By This Court In *Ellerth* and *Faragher*.

In *Burlington Industries, Inc. v. Ellerth*, *supra*, and *Faragher v. City of Boca Raton*, *supra*, this Court established that in Title VII sexual harassment cases in which no tangible

employment action is taken, an employer may not be held liable if it can establish a two-part affirmative defense: that it exercised reasonable care to prevent and correct promptly the harassing conduct, and that the employee unreasonably failed to utilize the employer's preventive and corrective procedures.

In the present case, it was undisputed that the Petitioners were put on notice of MILLER's unwelcome physical touching of other employees at ALLDATA. Several of MILLER's co-employees provided their supervisors with graphic descriptions of MILLER's conduct, how it bothered them, and some even labeled such as "harassment." Since MILLER refused to heed verbal and written warnings to cease her unwelcomed physical conduct toward her co-workers, the Petitioners were obligated by law to impose more severe disciplinary action to prevent and correct her misconduct. *See Intlekofer v. Turnage*, 973 F.2d 773, 777 (9th Cir. 1992) (employer failed to establish an affirmative defense where it did not take more severe disciplinary measures once it learned that the harassing conduct had not stopped). *See also Fuller v. City of Oakland, California*, 47 F.3d 1522, 1528 (9th Cir. 1995) (employer did not satisfy its remedial obligation where the harasser voluntarily ceased the harassment because an employer's legal obligation is to provide a remedy that meets with the twin goals of stopping the harassment and deterring the harasser and others in the workplace from engaging in inappropriate conduct).

An employer that has knowledge that one of its employees has engaged in conduct that *may* violate its anti-harassment policy and/or federal or state laws ensuring a workplace free of harassment *must* take action to correct and prevent such from reoccurring or it will lose the affirmative defense made available to it by this Court in *Ellerth* and *Faragher*. An employer cannot be expected to hope that employees who voice concerns about witnessing or being the recipient of unwelcomed physical touching by a co-employee

would not later commence or join a legal proceeding. *See Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 316 (5th Cir. 1995) (Title VII does not prohibit an employer from taking action to end behavior that in the employer's opinion creates an undesirable work environment) and *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1076, 901 P.2d 693, 702 (1995) (public policy requires that employers be given broad discretion to determine what types of speech and conduct fall within the category of sexual harassment when determining whether to terminate an employee).

Finally, the Sixth Circuit's decision inhibits an employer from taking action to satisfy the first prong of the affirmative defense by subjecting it to liability from a suit brought by an admitted harasser. Essentially, the Sixth Circuit's opinion presents an employer seeking to satisfy its legal obligation to provide a workplace free of harassment with a Hobson's choice. If the employer discharges the admitted harasser, to satisfy the first prong of the affirmative defense in regard to potential claims brought by victims of the harasser's conduct, it runs the risk of the harasser alleging some form of discrimination and prevailing against it. If the employer refuses to discharge the admitted harasser, due to fear of a successful discrimination lawsuit brought against it, the employer compromises its ability to prevail in a suit brought by any of the victims of the harassment because it will not be able to demonstrate that it "exercised reasonable care to prevent and correct promptly the harassing conduct."

POINT II

IT IS REVERSIBLE ERROR FOR A TRIAL COURT TO REFUSE TO INSTRUCT A JURY THAT IN THE PRETEXT ANALYSIS, ITS PROPER INQUIRY IS NOT WHETHER AN EMPLOYEE *IN FACT* ENGAGED IN THE ALLEGED

MISCONDUCT FOR WHICH SHE WAS DISCHARGED, BUT WHETHER THE EMPLOYER ACTED IN *GOOD FAITH* AND *HONESTLY BELIEVED* THAT THE EMPLOYEE WAS DISCHARGED BECAUSE OF HER CONDUCT

The ultimate issue in a discrimination case is whether the plaintiff has proven that the defendant intentionally discriminated against him because of his protected status. *St. Mary's Honors Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). Where an employer discharges an employee for engaging in conduct that it believes amounted to sexual harassment, it is imperative that a jury hearing the discharged employee's discrimination claim be instructed that in the pretext analysis, its inquiry is not whether the employee actually engaged in the misconduct, but rather whether the employer acted in good faith and was honest in its explanation of why the employee was fired. As demonstrated in POINT I, *supra*, the Sixth Circuit's decision in this case conflicts with the authoritative decisions of every other United States Court of Appeals that has held that an employer will not be found liable to any employee who is discharged for engaging in conduct the employer believed in good faith amounted to sexual harassment. *See* POINT I, *supra*, and cases cited therein.

The Sixth Circuit's affirmation of the trial court's refusal to give the Petitioners' requested "honest belief" instruction constituted prejudicial error. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998) (when employer establishes its reasonable reliance on the particularized facts that were before it at the time the decision was made, the "honest belief" rule applies); *O'Conner v. De Paul Univ.*, 123 F.3d 665, 671-72 (7th Cir. 1997) (on the issue of pretext, the only concern is the honesty of the employer's explanation) and *Jones v. Flagship International*,

793 F.2d 714, 724 (5th Cir. 1986) (employer need not have been correct in its basis for suspending and discharging the plaintiff to show that its actions were motivated for non-retaliatory reasons).

In the present case, no evidence contradicted the testimonies of Ms. Oberg and WEIFFENBACH that each honestly believed that MILLER's employment had to be terminated because she refused to follow the directives given to her to stop touching her co-employees in violation of ALLDATA's anti-harassment policy and that her conduct created potential liability for ALLDATA, and each of them personally, under California law.

Had the jury been properly instructed, MILLER's admitted refusal to follow WEIFFENBACH's directives, the numerous complaints from ALLDATA employees of MILLER touching them, and the obligations imposed on an employer by federal and state laws, constituted sufficient evidence for the jury to conclude that the Petitioners' honestly believed that MILLER was discharged because of her perceived misconduct. *See Biolchini v. Gen. Elec. co.*, 167 F.3d 1151, 1155 (7th Cir. 1999) (plaintiff alleging age discrimination failed to show that the repeated complaints from other employees and the employer's finding that he violated its policy on sexual harassment were insufficient to motivate the decision to demote him).

The Petitioners' were further prejudiced by the trial court's refusal to give the Petitioners' requested instruction because MILLER then produced evidence and argued that several of the employees who had complained about her conduct at the time of the events really did not mean what they had said. The refusal to give the requested instruction resulted in the jury not being focused on the honesty of the Petitioners' explanation as to why it made the decision to discharge MILLER, but rather on whether in hindsight, the "victims" believed that MILLER had "sexually harassed" them. Contrary to the decision of the Sixth Circuit, an

employer is entitled to rely in good faith on the information presented *at the time* the decision to discharge is made. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 (5th Cir. 1993).

POINT III

IT IS REVERSIBLE ERROR FOR A TRIAL COURT TO REFUSE TO ALLOW AN EMPLOYER TO AMEND ITS ANSWER TO ALLEGE THE "AFTER-ACQUIRED EVIDENCE" DEFENSE AND PRESENT EVIDENCE AT TRIAL THAT THE PLAINTIFF HAD ENGAGED IN MISCONDUCT *AT THE TIME OF HER DISCHARGE* FROM EMPLOYMENT

The decision of the Sixth Circuit conflicts with *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) to the extent it affirmed the trial court's denial of the Petitioners' motion to amend their answer to raise the "after-acquired evidence" defense and present evidence of MILLER's misconduct at trial. (Appendix at 15a.)

In *McKennon*, which involved a claim of age discrimination in violation of the Age Discrimination in Employment Act, this Court held that after-acquired evidence of employee misconduct is relevant to the scope of relief available and will preclude reinstatement or front pay as remedies. A discharged employee's measure of backpay will be from the date of the unlawful discharge to the date of the discovery of the evidence of misconduct. *Id.* at 363.

First, evidence of MILLER's misconduct in stealing ALLDATA's computer was relevant to an assessment of her credibility and should have been

admitted. The relevance of such evidence was enhanced because it arose from the same circumstances of her discharge that gave rise to her claim. *See Vichare v. AMBAC, Inc.*, 106 F.3d 457, 460 (2nd Cir. 1996) (evidence that the plaintiff took kickbacks, while not relevant to liability, was relevant to the plaintiff's credibility) and *Chnapkova v. Koh*, 985 F.2d 79, 82 (2nd Cir. 1993) (it is an abuse of discretion to forbid cross-examination on the issue of whether the witness has made false statements on tax returns).

Second, characterizing MILLER's stealing of a company computer containing confidential information as not occurring "until after she was fired," is factually incorrect and also deprives employers of the ability to limit the damages that may be awarded to an employee who engaged in misconduct *concurrent* with her discharge. In its opinion, the Sixth Circuit ignored the fact that as a condition to being employed with ALLDATA, MILLER was required to sign a Confidentiality Agreement. Per the standard language often found in such agreements, MILLER promised to return all equipment and information entrusted to her to ALLDATA *at the time* of her termination from employment.

The Petitioners' motion to amend their answer, and their offer of proof made at trial, established that had they been aware of the misrepresentations made by MILLER to secure employment, she would not have been hired at ALLDATA. Where an employee makes misrepresentations on a job application or resume concerning matters that were sufficiently material, the federal courts have granted summary judgment in favor of an employer or precluded relief otherwise

available to the dishonest plaintiff. *See, e.g., Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir. 1994) (after-acquired evidence of employee's misrepresentation on job application bars plaintiff's age discrimination and breach of employment contract claims); *Johnson v. Honeywell Information Systems Inc.*, 955 F.2d 409, 411-12 (6th Cir. 1992) (plaintiff not entitled to any relief on his retaliation claim where employer demonstrated that it would not have hired her had it known of her misrepresentation to secure employment).

Finally, the Sixth Circuit's opinion is an overly restrictive reading of *McKennon* in that it permits an employee who is discharged to engage in misconduct *at the time of the discharge* with impunity. Characterizing MILLER's theft of ALLDATA's computer and the confidential information contained therein as misconduct that she engaged in *after* she was discharged ignores the realities of the workplace. An employee is still an employee during the time he or she is being informed of their discharge, and for a reasonable time thereafter to permit the parties to "wind up" their relationship. Labor arbitrators have long considered misconduct engaged in by the employee when being informed of their termination as relevant. *See, e.g., Paratransit, Inc. and SEIU, Local 22*, 100 LA 981 (Brand, Arb. 1993) (the grievant's misconduct engaged in when being informed of his termination is relevant to the issues of credibility and remedies) and *Columbus Show Case and Sheetmetal Workers*, 44 LA 507, 513-14 (a grievant's actions subsequent to his discharge should be taken into account in considering matters of reinstatement and backpay insofar as they may relate to his fitness for employment and as they bear upon

the effect of his reinstatement on plant morale, discipline, efficiency and the like).

In short, the Sixth Circuit committed prejudicial error in affirming the trial court's orders precluding the Petitioners from amending their answer and being able to present evidence of MILLER's misconduct in this case. Even if MILLER's misconduct is viewed as occurring "after" discharge, in appropriate circumstances, the logic of *McKennon* may permit certain limitations on relief based an employee's *post-termination* conduct. *See* Christine Neylon O'Brien, The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer's Burden, Remedial Guidance, and the Enigma of *Post-Termination* Misconduct, 65 UMKC L. Rev. 159, 174 (1996) (concluding that egregious *post-termination* misconduct should ordinarily bar reinstatement and curtail backpay).

Conclusion

Based on the foregoing, the Petition for Writ of Certiorari should be granted.

Dated: November 21, 2001.

Respectfully submitted,

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No. 99-2035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KAREN MILLER,
Plaintiff-Appellee,

v.

ALLDATA CORP., and ROBERT WEIFFENBACH,
Defendants-Appellants.

July 6, 2001, Filed

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PRIOR HISTORY:
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 98-10138. Roberts. 08-25-99.

DISPOSITION:
Court AFFIRMED the district court's denials of Alldata's motions for judgment as a matter of law, new trial, and remittitur, and court AFFIRMED the district court's award of $ 177,628.29 in attorney's fees, costs, and interest to Miller.

COUNSEL:
For KAREN REED MILLER, Plaintiff - Appellee: E. Michael Morris, Daniel G. LeVan, Morris & Doherty, Birmingham, MI.

For ALLDATA CORPORATION, ROBERT WEIFFENBACH, Defendants - Appellants: Robert L. Rediger, Rediger McHugh, Sacramento, CA.

JUDGES:
Before: MARTIN, Chief Judge; MOORE, Circuit Judge; and O'MALLEY, District Judge.

OPINIONBY:
Kathleen O'Malley

OPINION:

O'MALLEY, District Judge. Plaintiff Karen Miller sued her ex-employer, defendant Alldata Corporation, and her former supervisor, defendant Robert Weiffenbach, jointly and severally, for gender discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § § 37.2501-2507. A jury found in Miller's favor and awarded her $ 16,000 in economic damages and $ 300,000 for emotional distress damages.

The defendants responded to the jury's verdict with motions seeking: (1) judgment (notwithstanding the verdict) as a matter of law; (2) new trial; and/or (3) remittitur. The district court denied all of these motions, and also awarded Miller $ 177,628 in attorney's fees.

The defendants appeal each of these decisions. Finding no error, we AFFIRM.

I.

This gender discrimination case presents the relatively unusual situation where the plaintiff admits her employer may have had a valid reason for terminating her, but asserts her employer's action was, instead, actually motivated by illegal discrimination. The jury found the plaintiff's assertion well-taken.

The following evidence was adduced at trial. Harry Evangelist, Ted Mannheimer, and plaintiff Karen Miller all worked similar jobs within the National Accounts Group at the Mitchell Corporation. In 1996, all three left Mitchell to work for defendant Alldata Corporation, a competitor to Mitchell Corporation and a subsidiary of AutoZone. Specifically, Robert Weiffenbach, Alldata's Vice President of Sales, hired Mannheimer away from Mitchell Corporation in May of 1996, to become Alldata's Director of Government and Fleet Sales, at an annual salary of $ 87,500. In June of 1996, Weiffenbach hired Evangelist away from Mitchell Corporation to become Alldata's Director of National Accounts, also at an annual salary of $ 87,500.

In July of 1996, Alldata's president, Rod Georgiou, suggested to Weiffenbach that he should also hire Miller, whom Georgiou knew from trade shows. In September of 1996, Weiffenbach hired Miller to manage Alldata's Value Added Reseller Accounts; she was given the title of Manager of Special Accounts and an annual salary of $ 62,500. While she worked at Alldata, Miller was the only female in the company's sales force. Evangelist, Mannheimer, and Miller all reported directly to Weiffenbach, and Alldata's Field Sales Organizational Chart showed the three as being at the same hierarchical level within the company.

Shortly after Alldata hired her, Miller attended an Alldata sales conference in Atlanta. Terry Buschbach, a sales representative who reported to Mannheimer, testified that, during this conference, Miller gave him a backrub on a walk back to the hotel from dinner. Buschbach felt the touching

was "not appropriate" and told Miller so. At trial, Miller acknowledged touching Buschbach, but testified she "kind of ran up to him and put [her] arm either around his shoulders or on his shoulder to say something," and that it was not sexual in any way. Weiffenbach verbally reprimanded Miller for this episode while they were still in Atlanta.

A month later, in early October, Miller attended another Alldata sales conference in Sacramento, California. The night before the meeting was to begin, Miller met several other Alldata employees at a hotel lounge to have a drink. Sales representative Kerry Keller testified he was seated in the bar when Miller "came up and sat down beside the chair, threw her arm around me, had her leg draped across the top of mine and just started talking to the rest of the guys like nothing [was] going on." Keller stated he was "shocked" by Miller's conduct and felt it had sexual overtones. The next day, Keller observed Miller rubbing the shoulders of several male Alldata employees. Weiffenbach again spoke to Miller about inappropriate touching while in Sacramento.

Keller claims he decided to document his concerns about Miller's behavior shortly after this Sacramento meeting. Keller testified that he sent Weiffenbach an e-mail describing Miller's conduct and stating he believed Miller could become a liability to Alldata. Weiffenbach testified he did not receive this e-mail until mid-November. Neither Alldata nor Weiffenbach was able to produce Keller's original e-mail. The evidence was clear, however, that Weiffenbach asked Keller to send a re-creation of the message several months later, on March 14, 1997, the day after Miller's termination.

In November of 1996, Weiffenbach contacted Karlyn Oberg, Alldata's human resources director, for advice regarding Miller's conduct. Oberg concluded that Weiffenbach should "have a more emphatic conversation [with Miller] . . . , document the conversation, and send her that documentation in writing so that it would be as formal as

possible." Weiffenbach sent Miller a memorandum on November 19, 1996, directing her to "refrain[] from any physical contact other than a business acceptable handshake or similar activity." The memorandum further warned Miller that, in the event of similar complaints about her behavior, "further disciplinary actions will result, up to and including termination of employment from Alldata." Miller responded that she would follow Weiffenbach's directive.

Alldata held another sales conference in Sacramento in December of 1996. Despite having received Weiffenbach's warning, Miller hugged and rubbed the shoulders of other Alldata staff during training classes. In trial testimony, she conceded she might also have slapped an employee on the butt. One evening, after training classes, she put her hand on the leg of fellow salesperson Rene Young. Midway through the conference, several employees told Alldata national training manager Mark Gunnerson they felt "uncomfortable with regard to [Miller] touching them." Gunnerson relayed these comments to Weiffenbach, who told Gunnerson to take control of his class and tell Miller to stop touching other staff inappropriately. Gunnerson believed that one employee in particular, Mike Smith, was especially unhappy with Miller's behavior. At trial, however, Smith denied being "truly upset" by Miller's having touched Young at the December meeting, and said Miller never touched him personally. Smith also testified he did not complain to anyone at Alldata about Miller's conduct, and that no one in his class believed Miller had sexually harassed anyone. Young testified he was "startled" when Miller touched his leg, but he did not consider it to be a sexual advance.

In a conversation with Weiffenbach roughly three weeks later, Weiffenbach claimed Gunnerson again expressed concern about Miller's conduct at the December training class. Weiffenbach said he explained that, if Gunnerson wanted him to address the complaints about Miller, Gunnerson would have to document them in writing.

Gunnerson did not e-mail documentation of the December complaints until March 12, 1997, however, the day before Miller's termination. At trial, Weiffenbach could not explain why it took Gunnerson so long to send the documentation. Weiffenbach explained he had concluded the matter was inconsequential and "figured if it was serious the people would give [him] this thing in writing."

The sum of this evidence suggests Miller was excessively "touchy-feely," to the point that she made some of her colleagues uncomfortable, but that most of her colleagues did not actually believe she was sexually harassing them. As for Weiffenbach, the evidence suggests he knew of his staff's discomfort with Miller, but he believed the issue was not especially serious and that his senior managers could and would deal with it appropriately. The evidence also suggests Weiffenbach solicited documentation of complaints about Miller just before she was terminated.

In addition to the evidence showing Miller's co-employees were unhappy with her level of physical familiarity, evidence was also adduced showing Miller had reason to be unhappy with Weiffenbach's behavior. Miller testified that, almost immediately after her hire, Weiffenbach began criticizing and degrading her in front of Alldata customers. This included rolling his eyes and explaining to customers that Miller did not know what she was talking about. Weiffenbach answered phone calls from Miller rudely, while he was more pleasant to male employees; he subjected Miller's travel expense reports to criticism and scrutiny that he spared male sales representatives; and he demanded Miller submit her travel plans one month in advance, while not requiring the same from Evangelist and Mannheimer. More than once, Weiffenbach called Miller at home at 5:00 in the morning to discuss non-emergency business issues, although he did not bother his male employees at such odd hours. He once told Miller, "you're the reason I never re-married." Evangelist and Mannheimer confirmed that Weiffenbach

frequently berated and reprimanded Miller for business conduct that they regularly followed themselves without repercussion, and that Weiffenbach required her to follow rules that he did not enforce against any one else. Evangelist also testified that Weiffenbach referred to women in lewd and derogatory terms "almost every time [they] were together." The evidence was undisputed, moreover, that Miller, though working in the same capacity as Weiffenbach and Mannheimer, was paid substantially less.

After the December, 1996 sales meeting in Sacramento, no Alldata employee complained again about Miller's behavior. In early March of 1997, however, Weiffenbach informed Oberg he had received additional complaints about Miller's conduct. Oberg told him to investigate further and report back. Weiffenbach then requested written statements from personnel who had previously indicated they had concerns about Miller. For example, in response to a request from Kerry Keller, Mike Smith e-mailed a memo regarding Miller on March 1, 1997. In this e-mail, Smith described Miller's conduct as "very unprofessional," and said that if other members in the December sales training class had acted that way, their jobs would be "toast." Smith testified he had not planned on writing this memo until Keller asked him to do so.

Shortly after Weiffenbach's discussion with Oberg, he reported to her that the information he had originally gathered had been supported by conversations with Keller and Gunnerson. After reviewing the "whole process," Oberg and Weiffenbach agreed they had "no choice but to terminate [Miller]." In a three-way telephone conversation on March 13, 1996, Oberg and Weiffenbach told Miller she was being fired for repeatedly and inappropriately touching other employees. Miller asked for a lesser punishment and promised to "sew [her] hands in [her] pockets," but Alldata did not relent.

After Miller left, Weiffenbach hired Ed Maron to fill a position similar to Miller's. Weiffenbach contends he called Maron only after Miller had been fired. But Maron testified he initiated a call to Weiffenbach in mid- to late-March about possible employment at Alldata, and Weiffenbach had responded, "we're working on something and I'll get back to you shortly." Maron started work at an annual salary of $ 65,000, which was raised to $ 75,000 three months later.

After Alldata terminated her, Miller began working for her husband's company. Three months later, Miller obtained a national sales position with Anderson Corporation, at an annual salary of $ 62,500.

At the close of Miller's evidence, Alldata made a motion pursuant to Federal Rule of Civil Procedure 50(b) for judgment as a matter of law, which the district court denied. On June 16, 1999, the jury returned a verdict awarding Miller $ 316,000. Alldata renewed its motion for judgment as a matter of law and moved for a new trial and/or remittitur. The district court denied these motions and also awarded Miller $ 177,628.29 in attorney's fees, costs, and interest.

I. Alldata's Renewed Motion for Judgment as a Matter of Law.[2]

Alldata contends it is entitled to judgment as a matter of law on Miller's gender discrimination claim because she failed to demonstrate that the business reasons offered by Alldata for firing her were a mere pretext for gender discrimination. This renewed motion for judgment as a matter of law challenges the sufficiency of the evidence supporting the jury's verdict. In diversity cases, this Court applies a state-law standard of review to a Rule 50(b) motion for judgment as a matter of law based on a challenge to the sufficiency of the evidence. *Morales v. American Honda Motor Co., Inc., 151 F.3d 500, 506 (6th Cir. 1998)* (citing *K*

& T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 176 (6th Cir. 1996)).

In *Matras v. Amoco Oil Co., 424 Mich. 675, 385 N.W.2d 586 (1986),* the Michigan Supreme Court explained the applicable standard as follows:

> In reviewing a trial court's failure to grant a defendant's motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, the motion should have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury.

Id. at 681-82, 385 N.W.2d at 588. A directed verdict is appropriate only when a case presents no factual dispute on which reasonable minds could differ. *Meagher v. Wayne State Univ., 222 Mich. App. 700, 708, 565 N.W.2d 401, 409 (1997), appeal denied, 457 Mich. 874, 586 N.W.2d 919 (1998).*[3]

This Court applies state substantive law to the state law claims in a diversity action. *Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* Because Miller brings her gender discrimination claim under Michigan's Elliott-Larsen Civil Rights Act, Michigan substantive law governs this action. Michigan courts, in turn, look to federal law when reviewing claims of employment discrimination filed under the Elliott-Larsen Act. *Lytle v. Malady, 456 Mich. 1, 27, 566 N.W.2d 582, 595 (1997).* Michigan has adopted the United States Supreme Court's burden-shifting

analysis for employment discrimination claims. *Id.; Featherly v. Teledyne Industries, Inc., 194 Mich. App. 352, 362, 486 N.W.2d 361, 364 (1992).*

A. The Prima Facie Case

The Supreme Court first laid out its process for testing the sufficiency of an employment discrimination case in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)* and refined this process in *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).* Initially, the plaintiff bears the burden of proving by a preponderance of the evidence a prima facie case of discrimination. To establish a prima facie case of gender discrimination under the *McDonnell-Douglas* framework, a plaintiff must show that she: (1) is a member of a protected class; (2) was subjected to an adverse employment action; (3) was qualified for her position; and (4) was replaced by a person outside of the protected class. *Matras, 424 Mich. at 683, 385 N.W.2d at 589.*

As a woman, Miller is a member of a protected class. She was subjected to an adverse employment action when Alldata fired her on March 13, 1997. Evidence of her employment history with Mitchell Corporation suggests, and Alldata does not dispute, that she was qualified for her Alldata sales management position. And, Alldata replaced Miller with a man named Ed Maron shortly after her termination. It is clear, accordingly, that Miller did establish a prima facie case of gender discrimination.

B. Defendant's Legitimate Reason for Plaintiff's Termination.

Once the plaintiff has made out a prima facie case, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate,

nondiscriminatory reason. *Burdine, 450 U.S. at 254.* This is merely a burden of production; the ultimate burden of persuasion remains with the plaintiff. *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).*

In this case, Alldata introduced evidence that Miller subjected male employees to unwanted touchings, and thus subjected Alldata to possible liability for tolerating sexual harassment at the company. Miller does not dispute that she engaged in unwelcome physical contact with her male co-employees, nor that Alldata reprimanded her for doing so. Although Miller testified she did not "feel there [was] anything wrong with [her behavior]," she essentially concedes Alldata had a nondiscriminatory reason for firing her. Alldata's gender-neutral explanation for its action "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Burdine, 450 U.S. at 255 n.10.*

C. Plaintiff's Rebuttal.

In the final step of the analysis, the burden shifts back to the plaintiff to show that the defendant's proffered reason is merely a pretext for intentional discrimination against the plaintiff. *Meagher, 222 Mich. App. at 711, 565 N.W.2d at 410.* The plaintiff may prevail if she can adduce evidence showing that: (1) the proffered reason had no basis in fact, or (2) the proffered reason did not actually motivate the employer's action, or (3) the proffered reason was insufficient to motivate discharge. *Id. at 711-12, 565 N.W.2d at 411; Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994).* Miller relied at trial, and in her appellate briefs, primarily on the second prong. We conclude there was sufficient evidence from which a jury could reasonably conclude that, in fact, Alldata's stated reason for terminating Miller was not its actual reason, and that, instead, Alldata terminated Miller based on gender discrimination.

Under the second prong, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* have motivated dismissal. *Manzer, 29 F.3d at 1084.* The plaintiff then makes an indirect attack on the credibility of the employer's proffered explanation by showing circumstances which tend to prove that an illegal motivation was more likely. *Id.* That is, the plaintiff argues that the sheer weight of circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext. *Id.*

Miller presented at trial substantial circumstantial evidence that Alldata (and, particularly, Weiffenbach) was more likely motivated to terminate her by a discriminatory intent than by a desire to promote a harassment-free workplace. As noted, Miller, Evangelist, and Mannheim all testified consistently that, from the beginning of Miller's tenure with Alldata, Weiffenbach treated her differently than male employees. This different treatment included reprimands they did not receive for similar behavior, enforcement of rules against her and not them, and a heightened degree of scrutiny, criticism, and unsupportive attention applied to her but spared the male sales representatives. Further, although virtually every Alldata employee perceived Evangelist, Mannheimer, and Miller as occupying the same hierarchical level within the company (confirmed by Alldata's Field Sales Organizational Chart), Miller was paid $ 25,000 less per year than her two male colleagues. After Alldata hired Maron to fill a position similar to Miller's in March 1997, it quickly gave him a raise to pay him $ 12,500 more than she had been making. Put simply, there was a large body of evidence from which a jury could reasonably reach the conclusion that Weiffenbach singled out Miller for adverse treatment because of her gender.

In addition to this evidence of discrimination, Miller presented evidence that Weiffenbach misled human resources

director Oberg as to the timing and validity of the complaints against Miller.[4] In early March of 1997, Weiffenbach informed Oberg he had received additional complaints about Miller since he had spoken to Oberg about Miller in November of 1996. However, the events Weiffenbach used to corroborate the existence of these "new" complaints had all taken place several months earlier. Further, Weiffenbach solicited documentation of these earlier events from Alldata personnel who had theretofore decided not to complain in writing, and Weiffenbach then pointed to these documents as new evidence of Miller's inappropriate behavior -- all at about the same time he learned that Maron, a male, was interested in working for Alldata and could replace Miller.

Alldata argues persuasively that it had a reason to terminate Miller. But Alldata does not persuade us that no reasonable jury could have found it more likely that Alldata's *actual* reason was gender discrimination. "If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury." *Matras, 424 Mich. at 682, 385 N.W.2d at 588.* Examining all testimony and drawing all inferences in the light most favorable to Miller, a reasonable juror could have concluded that: (1) Miller's unwelcome touching of other employees *may* have given Alldata reason to terminate her; (2) despite this, Alldata did not do so; and (3) Alldata's motivation when it ultimately terminated Miller was not because she acted inappropriately but, instead, was a gender-discriminatory animus. Accordingly, the district court did not err when it denied Alldata's motion for judgment as a matter of law.

II. Alldata's Motion for a New Trial.

In the alternative, Alldata argues it is entitled to a new trial, for a number of reasons. The denial of a motion for a new trial is reviewed under an abuse of discretion standard: "a definite and firm conviction [on the part of the reviewing

court] that the court below committed a clear error of judgment." *Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996).* We find that none of the recited bases for new trial leaves us with such a conviction.

Alldata first contends that the clear weight of the evidence necessarily leads to the conclusion that the jury made a mistake in rendering a verdict for Miller. In diversity cases, the district court applies federal law to determine whether the verdict was against the great weight of the evidence. *Morales, 151 F.3d at 506.* While this standard is lower than when evaluating the sufficiency of the evidence for judgment as a matter of law, *see* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2806 (2d ed. 1995), the standard is still rigorous, because in finding that a jury's verdict was against the weight of the evidence, the judge must, "to some extent at least, substitute[] his judgment of the facts and the credibility of the witnesses for that of the jury." *Duncan v. Duncan, 377 F.2d 49, 52 (6th Cir. 1967).* As noted above, the evidence Miller presented to show Alldata's discrimination against her was sufficient to support the jury's verdict; it was also sufficient, accordingly, for Miller to survive Alldata's motion for a new trial.

Alldata next argues the district court entered several erroneous evidentiary rulings that, singly or in combination, worked to its prejudice and denied it a fair trial. Specifically, Alldata points to the following rulings: (1) denial of Alldata's motion for leave to amend its answer; (2) grant of Miller's motions in limine; (3) denial of Alldata's motions in limine; and (4) refusal to give certain requested jury instructions.

With regard to Alldata's motion for leave to amend, Alldata contends that, after it fired Miller, she stole a company computer containing confidential information. Alldata contends the after-acquired evidence rule required the district court to grant the company leave to amend its answer

to assert this defense. The after-acquired evidence rule, which this Court first applied in the employment discrimination context in *Johnson v. Honeywell Information Sys., Inc., 955 F.2d 409 (6th Cir. 1992)*, holds that an employer can escape liability for its discriminatory actions if the company learns, after the fact, of an otherwise legitimate reason for having taken the adverse employment action.

In its order denying leave to amend, the district court concluded that the use of after-acquired evidence to limit a plaintiff's damages was appropriate only if "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge" (quoting *McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 363, 130 L. Ed. 2d 852, 115 S. Ct. 879 (1995)).* Miller's alleged misconduct did not occur until after she was fired. Because Alldata could not have known about the allegedly stolen computer before it terminated Miller, the district court was correct in concluding that Alldata's motion for leave to amend was not well-taken.

With regard to evidentiary rulings, the district court granted two of Miller's motions in limine before the start of trial. The first ruling precluded Alldata from introducing evidence that Miller stole the computer; the second ruling prevented introduction of a memorandum written by her subsequent employer, Anderson Corporation, stating her job was in jeopardy due to poor performance. The first ruling was correct for the reason noted above regarding after-acquired evidence; the second was correct because the memorandum was hearsay and also because Alldata had not produced it during discovery. The district court also denied two of Alldata's motions in limine -- one seeking to exclude Evangelist's testimony that Weiffenbach was a "chauvinist," and another seeking to exclude Miller's testimony that Alldata and Weiffenbach "discriminated against" her. Alldata argues that "conclusory labels of discrimination do not show

pretext and merely inflame or prejudice the jury." However, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). Furthermore, Rule 701 states that a lay witness may offer opinion testimony if those opinions are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Both this Court and Michigan courts have held it is not error to allow a lay witness to express an opinion regarding discrimination in an employment setting as long as the opinion complies with the requirements of Rule 701. *See Torres v. County of Oakland, Mich., 758 F.2d 147, 149-50 (6th Cir. 1985); Wilson v. General Motors Corp., 183 Mich. App. 21, 35, 454 N.W.2d 405, 413 (1989).* The district court was well within its discretion in refusing to exclude Evangelist's and Miller's testimony. In any event, we are certain that the district court's evidentiary rulings did not deprive Alldata of a fair trial.

Finally, Alldata contends the district court erred in refusing to give several proposed jury instructions. This Court reviews a district court's refusal to give requested jury instructions for an abuse of discretion. *Hisrich v. Volvo Cars of N. Am., Inc., 226 F.3d 445, 449 (6th Cir. 2000).* Although trial courts have broad discretion in framing jury instructions, state law determines the substance of jury instructions in a diversity action, while federal procedural law governs questions regarding the propriety of the instructions. *Id.*

Alldata asserts the district court committed error when it refused to: (1) instruct the jury as to the definition of an adverse employment action in Michigan; (2) give an instruction regarding "equal pay for equal work;" (3) give an instruction regarding what was required to show pretext; (4) read certain instructions addressing standards of sexual harassment; (5) read instructions regarding an employer's liability for tolerating sexual harassment under California

law; (6) instruct the jury regarding Alldata's "honest belief" that Miller engaged in inappropriate conduct; and (7) instruct the jury regarding situations when "the hirer and firer are the same individual." Without addressing each of these claimed errors individually, it suffices to say that the instructions given by the district court, taken as a whole, accurately stated the law, and the district court did not abuse its discretion in refusing to give different or additional instructions. Our review of the charge conference reveals the district court was careful to ensure that the instructions it did give to the jury did not favor either side. Alldata's requested instructions were either superfluous in light of the Michigan Standard Jury Instructions given, irrelevant in light of the evidence, or simply an incorrect statement of the law.

In sum, we find that none of Alldata's asserted bases for grant of a new trial are well-taken, and the trial court did not abuse its discretion when it denied the motion.

III. Alldata's Motion for Remittitur.

A. The $ 300,000 Emotional Distress Damage Award.

Alldata also appeals the district court's denial of its motion to remit the jury verdict. This Court reviews the denial of remittitur for an abuse of discretion. *Slayton v. Ohio Dept. of Youth Servs., 206 F.3d 669, 679 (6th Cir. 2000).* A district court should reduce a jury's award of damages only when the judgment "clearly exceeds" the maximum damages a reasonable jury could find to compensate the plaintiff's loss. *Id.* Thus, we may reduce a jury award only if it is: (1) beyond the range supportable by proof; (2) so excessive as to shock the conscience; or (3) the result of a mistake. *Id.* Moreover, the excessiveness of a verdict is primarily a "matter . . . for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses." *Id.* (citing *Wilmington v. J.I. Case Co., 793 F.2d 909, 922 (8th Cir. 1986)).*

Under Michigan law, "victims of discrimination may recover for the humiliation, embarrassment, disappointment, and other forms of mental anguish which flow from the discrimination." *Howard v. Canteen Corp., 192 Mich. App. 427, 435-36, 481 N.W.2d 718, 723 (1992).* Nonetheless, Alldata contends Miller presented no competent evidence from which a jury could infer that she suffered emotional distress as a result of her firing. Alldata asserts that "Miller called no witness to testify, and conceded that she received no medical treatment and had no documentation, to establish that she suffered emotional distress as a result of her termination." Michigan law, however, does not require that Miller present any of this particular evidence. For example, "medical testimony substantiating the claim is not required. When a verdict is within the range of evidence produced at trial it should not be reversed as excessive." *Id. at 435-36, 481 N.W.2d at 723; see Wilson, 183 Mich. App. at 40, 454 N.W.2d at 415* (even though the plaintiff presented no "expert testimony regarding her mental distress but only testimony as to her own subjective feelings," the appellate court allowed the $ 375,000 award -- remitted by the trial court from $ 750,000 -- of non-economic damages to stand).

Miller did testify that she suffered emotional distress as a result of her treatment by Weiffenbach. She testified she began having sleepless nights, and sought medical treatment for stomach problems that developed during her employment with Alldata. Miller claimed her firing negatively affected her family life, that she was a "wreck," and that she "took it out on [her] boys and [her] grandchildren." She also described the difficulty of dealing with the loss of income and benefits from her position at Alldata.

In 1995, the Michigan Court of Appeals suggested that *any* competent evidence of emotional damages would be enough to sustain a jury verdict. "Because evidence of emotional damage was presented at trial, and the award was comparable to awards in similar cases, the trial court properly

deferred to the jury and denied defendant's motions." *Paulitch v. Detroit Edison Co., 208 Mich. App. 656, 659, 528 N.W.2d 200, 203 (1995), appeal denied, 453 Mich. 970, 574 N.W.2d 28 (1996).* The evidence in *Paulitch* primarily included the plaintiff's own testimony that his "relationships with his wife and friends suffered after he was passed over for [a] promotion" because of discrimination at the hands of his employer. *Id.* The jury awarded the plaintiff $ 359,000 in economic and emotional distress damages, which the appellate court upheld.

Put simply, the jury's emotional distress damage award in this case appears to be within the realm of other verdicts in comparable cases upheld by the Michigan appellate courts and this Court. *See, e.g., Lilley v. BTM Corp., 958 F.2d 746, 754 (6th Cir. 1992), cert denied, 506 U.S. 940, 121 L. Ed. 2d 287, 113 S. Ct. 376 (1992)* (upholding a verdict of $ 350,000 for emotional distress damages flowing from the employer-defendant's violation of the Elliott-Larsen Civil Rights Act). Accordingly, we conclude the district court did not abuse its discretion in denying Alldata's motion for remittitur of the emotional distress damage award.

B. The $ 16,000 Economic Damage Award.

Alldata also challenges the jury's award of $ 16,000 to Miller for economic loss resulting from her termination. Miller testified at trial that, after she was fired by Alldata, she lost salary she would have earned, was unemployed for three months, and lost her subsequent job at Anderson Corporation due to her litigation against Alldata. An expert witness testified that, based on Miller's earnings history, the actuarial present value of her lost wages and benefits from Alldata was between $ 339,000 and $ 696,000. While the jury awarded Miller only $ 16,000 in economic damages, the district court appears to have been well within its discretion in denying remittitur of that amount.

IV. Miller's Motion for Attorney's Fees, Costs, and Interest.

The district court granted Miller attorney's fees, costs, and interest in the amount of $ 177,628.29. This Court reviews a district court's award of attorney's fees and costs for an abuse of discretion. *Singleton v. Smith, 241 F.3d 534, 538 (6th Cir. 2001); Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 312 (6th Cir. 1997).* An abuse of discretion exists when this Court is firmly convinced that a mistake has occurred or when the district court relied on clearly erroneous findings. *Harrison v. Metropolitan Govt. of Nashville and Davidson County, Tenn., 80 F.3d 1107, 1112-13 (6th Cir. 1996), cert. denied, 519 U.S. 863, 136 L. Ed. 2d 111, 117 S. Ct. 169 (1996); Romstadt v. Allstate Ins. Co., 59 F.3d 608, 615 (6th Cir. 1995).*

In this diversity case, Michigan law governs whether an award of attorney's fees was appropriate. *Big Yank Corp., 125 F.3d at 312 n.5.* As a general rule, a federal court may not award attorney's fees to the prevailing party unless a statute or binding contract authorizes such a recovery. *Hall v. Cole, 412 U.S. 1, 4-5, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973).* The Elliott-Larsen Act does give the district court authority to award litigation costs and reasonable attorney's fees. Mich. Comp. Laws § 37.2802 (2000).

The "lodestar" figure of hours spent multiplied by the hourly rate is presumed to be the reasonable attorney's fee. *Schellenberg v. Rochester, Michigan Lodge No. 2225 of the Benevolent and Protective Order of Elks of the U..S.A., 228 Mich. App. 20, 53, 577 N.W.2d 163, 177 (1998).* Further, the district court considers the following factors when calculating the reasonableness of attorney's fees: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Employees and Judge of the*

Second Judicial Dist. Ct., Second Div. v. Hillsdale County, 423 Mich. 705, 750-51, 378 N.W.2d 744, 762 (1985).

Here, Miller's petition for an award of costs and fees included: (1) an itemized bill setting forth the date, description of work, and attorney and staff hours spent on this case; (2) the affidavits of Miller's attorneys setting forth their experience and qualifications, and attesting to the accuracy of their bill; (3) the Martindale-Hubbell listings for those attorneys; (4) excerpts from the Michigan Bar Journal's December 1997 Law Firm Economics Survey, which placed the rates charged by Miller's attorneys within the 75th to 95th percentile of rates charged by attorneys in the Detroit area; and (5) the client ledger card reflecting costs of this litigation.

In a post-trial hearing, the district court examined Miller's attorneys' documentation of their fees and addressed each of the *Hillsdale County* factors in turn. The court found that counsel's rates were reasonable and that Miller's case required extensive time and labor. The district court also referred to the paltry settlement offer made by the defendants. Given the defendants' settlement posture and the significant burden Miller bore in proving gender discrimination by Alldata, the district court found that Miller won a meaningful victory by proceeding to trial. The district court described the expenses incurred by counsel as "substantial" and found that Miller's two-year professional relationship with her attorneys was significant enough to merit the fees awarded to them.

We find that the district court did not abuse its discretion in awarding $ 177,628.29 in attorney's fees, costs, and interest to Miller.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denials of Alldata's motions for judgment as a matter of law, new trial, and remittitur, and we also AFFIRM the district

court's award of $ 177,628.29 in attorney's fees, costs, and interest to Miller.

Footnotes

* The Honorable Kathleen O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

[2] Unless otherwise noted, "Alldata" refers hereinafter to both defendants.

[3] Michigan courts use the terms "directed verdict" and "judgment notwithstanding the verdict" rather than "judgment as a matter of law," the term used by Fed. R. Civ. P. 50.

[4] There was no evidence that Oberg intentionally discriminated against Miller based on her gender.

CASE NUMBER 98-10438

UNITED STATES DISTRICT COURT EASTERN DISTRICT O F MICHIGAN NORTHERN DIVISION

KAREN REED MILLER,
Plaintiff(s),

v.

ALLDATA CORPORATION, a foreign corporation, and ROBERT WEIFFENBACH, jointly and severally,
Defendant(s).

HONORABLE VICTORIA A. ROBERTS

ORDER

For the reasons stated on the record on August 20, 1999,

IT IS HEREBY ORDERED that Defendants' Renewed Motion tbr Judgment as a Matter of Law [document 69] and Defendants' Motion for a New Trial, or in the Alternative, Motion for Plaintiffs Acceptance of a Remittitur [document 70], are denied.

VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

CASE NUMBER 98-10438

UNITED STATES DISTRICT COURT EASTERN DISTRICT O F MICHIGAN NORTHERN DIVISION

KAREN REED MILLER,
Plaintiff(s),

v.

ALLDATA CORPORATION, a foreign corporation, and ROBERT WEIFFENBACH, jointly and severally,
Defendant(s).

HONORABLE VICTORIA A. ROBERTS

JUDGMENT

This case having been tried to a jury; the jury having rendered a verdict in favor of Plaintiff in the amount of $316,000; Plaintiff having tiled a Motion for Entry of Judgment and for Award of Attorneys' Fees, Costs, and Interest; Defendants having filed a response thereto; Plaintiff having filed a Reply; a hearing having been held on August 20, 1999;

IT IS HEREBY ORDERED that Plaintiffs Motion for Entry of Judgment and for Award of Attorneys' Fees, Costs, and Interest [document 64] IS granted, and that Plaintiff is awarded interest on the jury's verdict in the amount of $34,945.03, attorneys' tees in the amount of $124,874.00, litigation costs in the amount of $4,000.00, and interest on the award of attorneys' fees in the amount of $13,809.26.

IT IS FURTHER ORDERED that judgment is entered in favor of Plaintiff. Karen Reed Miller, and against Defendants, Alldata Corporation and Robert Weiffenbach,

jointly and severally, in the total amount of $493,628.29, which includes the amount of the jury's verdict plus the additional amounts awarded above.

VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

No. 99-2035

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KAREN MILLER,
Plaintiff-Appellee,

v.

ALLDATA CORP., and ROBERT WEIFFENBACH,
Defendants-Appellants.

BEFORE: MARTIN, Chief Judge; MOORE, Circuit Judge; and O'MALLEY.* District Judge.

Filed August 29, 2001

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

*Hon. Kathleen McDonald O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

Supreme Court, U.S.
FILED
DEC 27 2001
CLERK

No. 01-741

In The

Supreme Court of the United States

ALLDATA CORPORATION, and ROBERT WEIFFENBACH, jointly and severally,

Petitioners,

v.

KAREN REED MILLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF ISSUES

1. Did Plaintiff present sufficient evidence to raise a question of fact as to whether Defendants' claim that Plaintiff had sexually harassed male fellow employees was a pretext for sex discrimination?

2. Did Plaintiff present sufficient evidence to raise a question of fact as to disparate treatment, *e.g.*, as to whether Defendants discriminated against her with regard to the terms and conditions of her employment?

3. Did the trial court abuse its discretion in denying Defendants' Motion for a New Trial, where: (a) the verdict was not against the great weight of the evidence; (b) the trial court had correctly denied Defendants' request for leave to amend because the after-acquired evidence doctrine does not apply to post-termination conduct; and (c) Defendants' proposed jury special instructions were either duplicative of the standard jury instructions given to the jury, or inconsistent with the law.

STATEMENT OF THE CASE

This is a sex discrimination case brought pursuant to Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). Defendant, Alldata Corporation ("Alldata"), is a California corporation that produces and sells automotive repair software. Defendant Robert Weiffenbach was Alldata's senior vice-president of sales, managed Alldata's sales force, was Plaintiff's direct supervisor, and was a decisionmaker in Plaintiff's termination.

Plaintiff, Karen Reed Miller, had a long history of national sales experience in the industry and was hired by Alldata in October 1996 as one of three national representatives in its "Special Accounts Group." Plaintiff was the only woman in Weiffenbach's sales force. Plaintiff

"loved" the Alldata product and worked 80 to 90 hours per week promoting the same.

Plaintiff was, however, from almost the beginning, subject to constant belittlement and disparate treatment by Weiffenbach. For example, Defendant told Plaintiff: "you're the reason I never re-married"; rolled his eyes and criticized her in front of customers; gave her the title "manager" while the two similarly situated males were given the title "director" and paid $25,000 more per year; constantly criticized Plaintiff for travel expenses, while not criticizing males with similar expenses; rudely berated Plaintiff; and verbally abused her when she called to ask questions. *See infra.* This was strong evidence of disparate treatment as to terms and conditions of employment, prohibited by ELCRA. One former Alldata employee characterized Weiffenbach as a "chauvinist" who repeatedly referred to women in a lewd manner.

Weiffenbach acted on his gender bias when, in March 1997, he terminated Plaintiff's employment on bogus charges of "sexual harassment," then replaced her with a man whom he paid $12,500 more. Defendants argued there was a legitimate business reason for such action, however, the evidence showed that the "sexual harassment" claim was manufactured by Weiffenbach to facilitate his plan to replace Plaintiff with a man.

The case was tried to a jury in June 1999 and after a five-day trial, the jury returned a verdict for Plaintiff. The trial court denied Defendants' post-trial motions. Final judgment was entered on August 25, 1999.

The Sixth Circuit Court of Appeals affirmed in an unpublished opinion. Defendants sought rehearing en banc, which was denied after the petition failed to receive a single vote.

STATEMENT OF FACTS

A. Plaintiff Is Hired Along With Two Male Counterparts To Work As National Sales Representatives In Alldata's "Special Accounts Group"

Prior to Alldata, Plaintiff worked for a competitor, the Mitchell Corporation, from 1985 through 1995 as a national sales representative along with Harry Evangelist and Ted Mannheimer, each of whom sold to a different segment of the national market. (Miller, 81-86) (references are to trial transcript). At Mitchell, the three representatives were peers, with the same responsibilities and job titles. (Evangelist, 8-13).

During a six-month period in 1996, Mannheimer, Evangelist, and Plaintiff were hired in as national sales representatives for Alldata's newly created "Special Accounts Group." (Evangelist, 16). Alldata's president, Rod Giorgiu (who had known Plaintiff since 1988) hired her to obtain "value added reseller" or "VAR" accounts. (Evangelist, 26-28; Miller, 91, 79-81).

Plaintiff was to report directly to Weiffenbach and be paid $62,500 per year. (R. 105, Ex. 1). When Plaintiff asked Weiffenbach for a higher salary, he responded: "[T]hat's all I'm gonna pay." (Miller, 82).

Plaintiff, Evangelist, and Mannheimer were "similarly situated." For example, Evangelist testified that he, Mannheimer, and Plaintiff had "peer position[s]," that they were "back to being the same thing at Mitchell again," and that "[n]ow they had the Mitchell group at Alldata." Evangelist believed that Plaintiff was being paid the same amount. All three reported directly to Weiffenbach. (Evangelist, 28-29, Miller, 88).

Alldata's "Field Sales Organization Chart" showed Plaintiff, Evangelist, and Mannheimer on the same level, in the "Special Accounts" Group. (R. 105, Ex. 2, Miller,

86-87, Weiffenbach ("W") 101-102). Plaintiff was the only female salesperson in Weiffenbach's sales force. (W, 6; Evangelist, 34; Miller, 116).

B. Weiffenbach's Sexist Remarks; Disparate Treatment As To Similarly Situated Males; Less Pay For Similar Duties, And A Lesser Title

Plaintiff worked more than 80 hours per week, "loved" working at Alldata and believed that it had a "very, very good product." (Miller, 90, 124). Weiffenbach acknowledged Plaintiff was competent at her job, that he had confidence in her abilities, and that job performance had nothing to do with her termination. (W, 116).

Nevertheless, Weiffenbach constantly downgraded Plaintiff. For example, Weiffenbach regularly criticized Plaintiff in front of customers, interrupted her and stated things like "she doesn't know what she's talking about," while rolling his eyes; he did not treat the male sales representatives in a similar fashion. (Miller, 89, 111). When answering Plaintiff's phone calls, Weiffenbach (who had caller I.D.) would rudely answer: "What do you want now?" Weiffenbach did not answer calls from male employees in that manner. (Miller, 93-94, 112-113). Indeed, Weiffenbach answered Evangelist's phone calls by saying "Hi, Harry," in a "very pleasant" tone of voice. (Evangelist, 34). Also, Weiffenbach would often call Plaintiff at 5:00 a.m., when he knew she would not be awake (Weiffenbach lived and worked out of Colorado, two hours behind Michigan). (Miller, 94-95).

Weiffenbach told Plaintiff that she was "*the reason [he] never re-married.*" (Miller, 112).

In addition to verbal abuse, Weiffenbach treated Plaintiff less favorably than similarly situated male

employees as to other terms and conditions of employment. For example, Evangelist and Mannheimer were paid $87,500, $25,000 more than Plaintiff. (Evangelist 17, R 105, Exs 1, 3 & 4). Weiffenbach also gave Plaintiff the title of "Manager of Special Accounts" while Evangelist and Mannheimer were "Directors." *Id.* Weiffenbach told Plaintiff: "I would never had hired you as a director." (Miller, 112).

Weiffenbach constantly criticized Plaintiff about travel expenses. Alldata provided a booklet, "AutoZone Travel Guide," which set forth guidelines and limits as to expenses. However, Evangelist testified that, based on his 25 years of experience, the spending guidelines were "ridiculous" and "ludicrous" because they were impossible to comply with. (Evangelist, 30). Mannheimer testified that "we all thought it was a joke." (R. 101, Mannheimer, 40-41).

Evangelist's hotel and rental car expenses regularly exceeded the guidelines, but Weiffenbach *never* criticized him and never gave him a limit. (Evangelist, 30-33). Similarly, Mannheimer testified that *"you just exercised good judgment."* (R. 101, Mannheimer, 47) (emphasis added). Yet, Weiffenbach constantly criticized Plaintiff for renting mid-size cars instead of sub-compact cars, citing the guidelines (Miller often entertained important clients). (Miller, 91-92). In contrast, Evangelist *always* rented full-size cars, and was *never* questioned by Weiffenbach and Mannheimer was *never* told of such restrictions. (Evangelist, 32-33, Mannheimer, 41, 44). Further, Weiffenbach demanded that Plaintiff submit travel plans one month in advance (Miller, 117), while *not* requiring the same from Evangelist or Mannheimer. (R. 102, W, 123).

When Plaintiff presented a proposal regarding a sales program for ADAM Software, Weiffenbach responded:

"forget it, this is a lousy idea." However, after Plaintiff's termination, when Evangelist submitted the identical proposal (with Plaintiff's approval), Weiffenbach told him to take the next step to determine if it was viable. (Miller, 114-115; Evangelist, 34-35).

Weiffenbach had observed Mannheimer and Evangelist initiate and exchange hugs with Plaintiff as a greeting, but never reprimanded them for that conduct. (R. 102, W, 28, 48; Evangelist, 36).

According to Evangelist, Weiffenbach was *"a chauvinist,"* who used derogatory and lewd statements when referring to women "almost every time [they] were together." (Evangelist, 40) (emphasis added).

C. The Alleged "Sexual Harassment"

While Plaintiff admitted to sometimes touching people in a non-sexual manner, she explained that, over the years, she had developed a very personal style of selling that worked for her. Prior to Alldata, no one *ever* complained that Plaintiff touched them in a sexual or inappropriate manner. (Miller, 99-101, 108-110).

The reality, as described by Karlyn Oberg (Alldata Human Resources), was that Plaintiff is just an "outgoing, very friendly, very close person." (Oberg, 48). Evangelist had often observed Plaintiff hugging other persons but never in a sexual manner. (Evangelist, 35-36). Plaintiff was "a very friendly person" with a "very bubbly personality" and "would give people open hugs," "Not the touchie-feelie type hugs . . . kind of like a pat-on-the-back type hug . . . a non-sexual hug, a business open hug. . . . non-groping hug." (R. 101, Mannheimer, 16-17, 64-65).

1. *Kerry Keller*

In Atlanta, on October 6, 1996, the night before a company meeting, Keller met fellow employees at the hotel lounge. (Keller, 107). According to Keller, Plaintiff approached, sat on the arm of his chair, and put her arm around him. (Keller, 96-100). Plaintiff sat on the arm because there were no other chairs available. (Miller, 105).

Shortly after, Keller told Weiffenbach that he thought Plaintiff's conduct was "intrusive" – *not* that he believed it was any type of sexual advance. (R. 102, W, 40-43). Weiffenbach claims he then told Keller that if he felt that strongly, he should write a memo – which Keller agreed to do. (R. 102, W, 31).

Keller claimed that, *shortly after returning from the October 6th meeting*, he e-mailed a complaint to Weiffenbach. (Keller, 87-88, 110-111). Weiffenbach testified that he did not receive an e-mail until about *five weeks after the meeting*. (R. 102, W, 32-33).

Defendants failed to produce Keller's original e-mail "complaint". Instead, Defendants produced an e-mail from Keller dated March 14, 1997 (the day *after* Plaintiff's termination), which purported to "re-create" the information. (R. 103, Defs' Ex. 6). Given Defendants' failure to produce the original document, a question of fact existed as to whether Keller's allegations were created or embellished after-the-fact, to support Plaintiff's replacement by a male.[1]

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[1] Weiffenbach claimed that, upon his original receipt of the Keller "complaint" (in November 1996), he immediately sent the e-mail to Karlyn Oberg, the head of personnel issues, to go into Plaintiff's personnel file. (R. 102, W, 33). Directly contradicting Weiffenbach, Oberg testfied that she *first* saw the Keller document in *March 1997*. (Oberg, 27-28).

2. *December 1996 Training Session*

Two "formal complaints," for which Defendant claims it eventually terminated Plaintiff, were written by Alldata employees Mark Gunnerson and Mike Smith in March 1997. (R. 103, Defs' Exs 3, 4).

Gunnerson was Alldata's national training manager, and in charge of running a December 1996 training class in Sacramento, California. (Gunnerson, 46-47). During a class break, other employees talked about Plaintiff's (outgoing) conduct. Though some employees were surprised, *none wanted to make any type of formal complaint.* (Gunnerson, 76-77). Gunnerson claimed, however, that one employee, Smith, reported that Plaintiff had touched *him*, and that Smith was *"truly upset."* (R. 103, Defs' Ex. 4, Gunnerson, 70, 73, 75). Contradicting Gunnerson, Smith testified that Plaintiff *never* touched him and that he was *not* "truly upset" about Plaintiff's conduct. (Smith, 9, 12). Moreover, Smith did *not* believe that Plaintiff's conduct was done in a sexual manner, and he did *not* complain to anyone. (Smith, 4-6). Smith further testified that *no one* in the class had stated they believed Plaintiff was sexually harassing anyone. (Smith, 12).

Another "offensive" act cited by Defendant was Plaintiff having touched the knee of another employee, Rene Young. (R. 103, Defs' Ex. 3, 4). However, Young testified that Plaintiff's conduct was *not* sexual, that he was *not* offended by it, and that he did *not* complain to anyone. (R. 106, Young, 15-16). A group of employees (including Weiffenbach) had voluntarily gathered in the hotel lounge and were telling sexually-oriented jokes and drinking. (R. 106, Young, 11-13; Smith, 13; Evangelist, 37-38; Miller, 109-110; R. 101, Mannheimer, 75). Smith (4-5) described how the knee touching episode was extremely innocuous:

> Rene Young was sitting right to my right and then there was Karen and everybody was taking turns telling their jokes and Renee was telling his joke and he got to the punch line, Karen got real embarrassed and she kind of covered her mouth and for whatever reason I looked down and I saw her hand touch his leg, like you know that was – you couldn't believe you said that kind of a joke.

D. Weiffenbach Solicits Written "Formal Complaints" Three Months Later

It is *undisputed* that Weiffenbach was told that Plaintiff had "touched" employees *during* the December 1996 training session. Gunnerson told Weiffenbach that Plaintiff was "grabbing the other students at the back of the neck, and rubbing their necks," and that some class members were "uncomfortable." (Gunnerson, 49-52; R. 102, W, 50-51). Weiffenbach told Gunnerson *"don't worry about it,"* because he did not think there was any type of sexual advance going on, and that Gunnerson should simply instruct her to cease. (R. 102, W, 51-52).

Weiffenbach claims that about two or three weeks later Gunnerson made a verbal "formal complaint," and that he told Gunnerson if he felt strongly, to put his complaint in writing. (R. 102, W, 55-56). However, Gunnerson did not prepare his written "complaint" until March 12, 1997, almost *three months* later. (Gunnerson, 55). Weiffenbach had "written the matter off," explaining: "I figured if it was serious the people would give me this thing in writing." (R. 102, W, 60-61).

Contradicting Weiffenbach, Gunnerson testified that, *several months after* the December 1996 training session, *Weiffenbach called Gunnerson* and *directed* him to "document" what he had observed. Weiffenbach falsely told

Gunnerson that "there's been more complaints," and he needed to act. Weiffenbach made this request only "a day or two" before Gunnerson drafted his March 12, 1997, letter. As Gunnerson explained: *"If he asked me to do something, I wouldn't delay."* (Gunnerson, 55-58, 60) (emphasis added).

Defendants also cited a "formal complaint" by Mike Smith on March 1, 1997. However, Smith testified that near the end of February his supervisor, Keller, called and *directed* him to write the letter. Prior to this call, Smith had no intent to submit any type of complaint about Plaintiff's conduct. (Smith, 6-7). Keller was directed by Weiffenbach, his direct supervisor, to get documentation from Smith. (Keller, 91, 112-113).

Thus, in reality, there were no "new" complaints in March 1997, as Weiffenbach had misrepresented to Gunnerson and Oberg. Indeed, Weiffenbach *admitted* that there were *no* other incidents of alleged inappropriate behavior brought to his attention after the December 1996 training session. (R. 102, W, 63-64, 99-100). Weiffenbach was well aware of Plaintiff's conduct in December, but did *nothing* at the time. Then, in March 1997, Weiffenbach and Keller (at Weifenbach's direction), *sought out* Gunnerson and Smith and *instructed* them to write letters complaining about Plaintiff.

E. Weiffenbach Further Misrepresents The Situation To Alldata's Personnel Director

Supposedly, in response to Gunnerson's March 12, 1997 memo, Weiffenbach called Karlyn Oberg, Alldata's de-facto personnel manager, to "ask for direction." (Oberg, 7-8, 21). Oberg was "surprised" she was just learning of complaints about conduct three months earlier and "wondered why [she] didn't hear about it in

December," because Alldata's sexual harassment policy *required* complaints of sexual harassment be *promptly* reported. (Oberg, 30-31). Oberg asked Weiffenbach about the delay. (Oberg, 21-22). In response, Weiffenbach *misrepresented* that "he had just learned of the matter himself." *Id.* (Oberg, 23-24).

Weiffenbach also misled Oberg in numerous other ways. For example, when Oberg approved Plaintiff's termination, *she believed that Young had complained and had been offended.* Oberg was also surprised to hear that Smith testified that he was not "truly upset," that Smith had no intention of writing a memo until it was solicited at Weiffenbach's direction and that Gunnerson did not make a written complaint until Weiffenbach called him (a day or two before March 12) and instructed him to prepare the memo. (Oberg, 39-42).

Oberg told Weiffenbach to "investigate" the complaints; talk to people who were involved, find out the best that he could what actually transpired, and report back. (Oberg, 15-16). Weiffenbach kept Oberg apprised of his "investigation." (Oberg, 29-30).

However, Weiffenbach's subsequent "investigation" was non-existent, as it consisted *solely* of the 4/1/97 Smith memo and 4/12/97 Gunnerson memo (which he *already* had when he first called Oberg). Weiffenbach agreed there were inconsistencies between the two memos, but never called the employees to address discrepancies. Weiffenbach did *not* interview Smith, Young, Evangelist, Jeff Ambrose, or any other attendees at the training session. (R. 102, W, 73-74, 83-84, 98-99). If he had, he would have known that the two primary persons who were allegedly "extremely offended" (Smith and Young) were *not* offended, did *not* believe Plaintiff's conduct was sexual, and did not wish to make formal complaints!

Based on Weiffenbach's "investigation," Plaintiff was terminated. (Oberg, 25-26). Weiffenbach told Plaintiff that the termination "has nothing to do with your performance." (R. 102, W, 28). Weiffenbach falsely explained to Plaintiff that he had been "investigating" the prior complaints and it had taken him months. Plaintiff begged to receive probation or anything else that would allow her to keep her job. However, Weiffenbach and Oberg responded that there was nothing else they could do. (Oberg, 18; Miller, 96-99; R. 102, W, 127-129).

Plaintiff was purportedly terminated for "sexual harassment." (R. 102, W, 18, 83; Oberg, 18-19, 26). Plaintiff's termination converted Weiffenbach's sales force back to an all-male staff. (R. 102, W, 22-23).

F. Weiffenbach Replaces Plaintiff With A Male Who Was Paid Substantially More

Weiffenbach promptly hired Ed Maron to fill Plaintiff's position. (R. 102, W, 123). Weiffenbach claims that he initiated a call to Maron *after* Plaintiff had been terminated. (R. 102, W, 90-93). Contradicting Weiffenbach, Maron testified that, in March 1997, *he called Weiffenbach* to advise that he was looking for a job. Weiffenbach stated that there was nothing available at that time, but that ***"we're working on something and I'll get back to you shortly."*** (Maron, 6-8) (emphasis added). Weiffenbach later called Maron indicating that he had a position available. Maron began his employment on April 1, 1997, and started at $65,000. Then, *only three months after Maron's hire* Weiffenbach *raised* Maron's salary by *$10,000*, without any corresponding increase in job duties. (R. 102, W, 124-126; R. 105, Exs. 5, 8). Weiffenbach admitted that, upon hiring, he told Maron that he would arrange a

salary "bump" in the near future. (R. 102, W, 127; Maron, 11-12).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Standard Of Review

When reviewing a renewed motion for judgment as a matter of law in a diversity case, federal courts apply the standard of review used by the courts of Michigan, whose substantive law governs the action. *Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 894 (CA 6 1997). The standard of review is as follows:

> In reviewing a trial court's failure to grant a defendant's motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony *and all legitimate inferences that may be drawn in the light most favorable to the plaintiff.* If reasonable jurors *could honestly have reached different conclusions,* the motion should have been denied. *If reasonable jurors could disagree,* neither the trial court nor this Court has the authority to substitute its judgment for that of the jury.
>
> A directed verdict or judgment notwithstanding the verdict is appropriate *only* when there is *no* factual dispute *upon which reasonable minds could differ.*

Id. (emphasis added, citations omitted).

B. Burden Of Proof

Reaffirming the holding of *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973), the United States Supreme

> Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981), set forth the order and allocation of the burden of proof in employment discrimination cases as follows. *First*, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Second*, if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. *Third*, if the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Id.; Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561, 563-564.

Featherly v. Teledyne Industries, 194 Mich. App. 352, 358, 486 N.W.2d 361 (1992).

To establish a *prima facie* case, a plaintiff must show: "(1) that [she] is a member of a protected group, (2) that [she] was subject to an adverse employment decision, (3) that [she] was qualified for the position, and (4) that [she] was replaced by a person outside of the protected class." *See, e.g., Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (CA 6 1995); *see also Feick v. Monroe Co.*, 229 Mich. App. 335, 338 (1998). In the case at bar, each element was undisputed: Plaintiff, a woman, was terminated, was undisputedly competent, and was replaced by a man.

Thus, the burden of production shifted to Defendants to articulate some "legitimate, nondiscriminatory reason" for firing Plaintiff. Defendants contended that Plaintiff was fired for "sexual harassment." (R. 102, W, 18, 83; Oberg, 18-19, 26). The burden of production then shifted back to Plaintiff to show that the articulated reason was a pretext for sex discrimination.

C. Plaintiff Presented Sufficient Evidence Of Pretext To Support The Jury's Verdict

Though employers have an obligation to take steps to prevent sexual harassment in the workplace, this does not, as Defendants suggest, make this case unique. The determinative question is still whether Defendants' stated reason for the termination was pretextual or unworthy of belief. *See, e.g., O'Connor v. DePaul Univ.*, 123 F.3d 665, 669 (CA 7 1997) ("As is often the case, then, the dispute comes down to the final step in the *McDonnell-Douglas* analysis, when the burden shifts back to [plaintiff] to show that the reason proffered by DePaul [sexual harassment by the plaintiff] was actually a pretext for discrimination.")

Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (CA 6 1994) sets forth *three* ways that a plaintiff can establish pretext:

> To make a submissible case on the credibility of his employer's explanation, the plaintiff is 'required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'

Id. at 1084 (emphasis added, quotation marks omitted).

A finding of pretext permits a jury to *infer* discrimination. In *Manzer*, the Sixth Circuit, relying on *St. Mary's Honor Society v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), *rejected* the "pretext-plus" position, and made it perfectly clear that evidence which is sufficient for a jury to reasonably reject the employer's explanation *"will permit the trier of fact to infer the ultimate fact of intentional discrimination,* and . . . *'[n]o additional proof of*

discrimination is required.' " *Manzer*, 29 F.3d at 1083 (emphasis added).

1. *Defendants' Stated Reason Had No Basis In Fact*

Defendants' claim that Plaintiff was terminated because of complaints of "sexual harassment" had no basis in fact. No one at the December 1996 training class believed that Plaintiff's conduct was sexual in nature and no one intended to submit a formal complaint. (Gunnerson, 76-77; Smith, 4-6, 12; R. 106, Young, 15-16).

Consequently, because there was sufficient evidence to create a question of fact as to whether Plaintiff's conduct provided any basis at all to discharge (given the lack of real complaints or concerns of employees), there was sufficient evidence supporting the jury's verdict.

2. *Defendant's Stated Reason Did Not Actually Motivate The Discharge*

> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by *showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant*. In other words, the plaintiff argues that *the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup*.

Manzer, 29 F.3d at 1084 (emphasis added).

The evidence detailed above clearly was sufficient to show pretext under the second method. That evidence, viewed in a light most favorable to Plaintiff, demonstrated that: (1) Weiffenbach *knew* about Plaintiff's alleged "sexual harassment" *shortly after it occurred* yet did not terminate Plaintiff until *three months thereafter*; (2) Weiffenbach did nothing until *after* he received a call from Maron who indicated that he was seeking a national sales position; (3) when Oberg asked Weiffenbach why he was taking action three months after the alleged conduct, Weiffenbach *misrepresented* he had just learned of it; (4) contrary to Defendants' assertion that two employees had voluntarily submitted "formal complaints," those employees had *no* intention to submit complaints until they were *directed by Weiffenbach* to do so; (5) the two employees who wrote "complaints" were never touched; (6) no employee at the December meeting believed that Plaintiff's conduct was sexual, and the so-called complaints were greatly embellished; (7) Weiffenbach ignored Oberg's direction to investigate; and (8) Weiffenbach falsely represented that there had been new complaints.

In addition, there was substantial evidence of Weiffenbach's predisposition, including: (a) radical disparate treatment in conditions of employment; (b) sexist statements;[2] (c) Evangelist's testimony that Weiffenbach was a "chauvinist", and repeatedly referred to women in a lewd manner; and (d) significantly higher pay to Plaintiff's male replacement.

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[2] "Stray remarks" by a decisionmaker not related to disputed employment action may be relevant to pretext question under the *McDonnell-Douglas* burden-shifting approach, even though they do not constitute direct evidence of discriminatory intent. *O'Connor v. DePaul Univ.*, 123 F.3d 665, 671-672 (CA 7 1997).

Moreover, it was reasonable for the jury to conclude that if Weiffenbach *truly* believed Plaintiff's conduct had exposed the company to liability for sexual harassment, he would have done something *in December 1996*. Instead, Weiffenbach did *nothing* for almost *three months*, and then, only after being contacted by a male interested in a job, *solicited* "formal complaints" (from persons who did not even believe Plaintiff's conduct was sexual, and had no intent to complain.) Weiffenbach then used such solicited complaints (*misrepresenting* to the company's personnel director that he had *just learned* of the conduct) as a basis to terminate Plaintiff and replace her with a male whom he paid $12,500 more per year.

3. *The Roger Brandt Comparison*

Defendants infer that the prior termination of Roger Brandt for sexual harassment in 1992 somehow insulated them from liability. However, Weiffenbach was **not** the decisionmaker in Brandt's termination. (R. 102, W, 129). Additionally, the Brandt allegations constituted *true* sexual harassment, *i.e.*, kissing an employee's neck, brushing an employee's breast and "taunting her about sexual harassment," other specific charges of "sexual harassment," and actual claims by at least ten women employees. Moreover, Brandt was terminated *seven days* after the final act. Lastly, Alldata conducted a *true* investigation in Brandt's case. (R. 103, Defs' Exs. 10 & 11).

Brandt was not "similarly situated," and could not be considered comparable because he dealt with a different supervisor, engaged in blatant overt sexual conduct, and was promptly discharged. However, if the Brandt termination *was* comparable, it actually provided *additional* evidence of disparate treatment because Brandt was offered the opportunity to obtain counseling and *to be*

eligible for rehire at Alldata. *Id.* Oberg, who *was* involved in Brandt's termination, admitted that this opportunity gave Brandt a "second chance." (Oberg, 50-52). Plaintiff was given *no* such "second chance." (R. 102 W, 127-129; Oberg, 18).

D. Sex Discrimination With Regard To Terms And Conditions Of Employment

Plaintiff also proved discrimination as to "terms" and "conditions" of her employment, under a disparate treatment theory. ELCRA explicitly precludes such discrimination. MCLA 37.2201.

The Court in *Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 651 (1994), explained:

> In order to establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a protected class, and that, for the same conduct or performance, she was treated differently than a man.

1. *Disparate Treatment With Regard To Ed Maron*

Defendants disputed disparate treatment as to Ed Maron (whom Defendants did *not* dispute was similarly situated), because his *starting* salary, $65,000, was "comparable" with Miller's salary of $62,500. However, *only three months after hire*, Weiffenbach *increased* Maron's salary by *$10,000*, for a total disparity of $12,500.

Weiffenbach claimed the increase was because a decision had been made to terminate Evangelist, and have Maron take over part of Evangelist's national accounts. (R. 102, W, 124-126). However, Maron's salary increase

took effect on July 1, 1997 (R. 105, Pls. Ex. 8) and Evangelist was not terminated until December 31, 1997. (Evangelist, 76). Consequently, Maron's pay was increased *six months before he assumed Evangelist's duties.* (R. 102, W, 124-125). Weiffenbach had *no explanation* for why he increased Maron's salary six months before any new duties were assumed. *Id.*

Clearly, paying Maron $12,500 more than Plaintiff was strong evidence of disparate treatment. In *Coleman-Nichols, supra,* the Michigan Court of Appeals held the plaintiff established a prima facie case of sex discrimination based on disparate treatment where, among other factors, a male co-worker was paid significantly more for being a supervisor. *Id.* at 652. In any event, this was another jury issue.

2. *Disparate Treatment With Regard To Evangelist And Mannheimer*

Further evidence of disparate treatment existed in Weiffenbach's treatment of Plaintiff versus her male counter-parts, Evangelist and Mannheimer. For example, the males were paid *$25,000 more* and given the title of "director" while Plaintiff was named "manager." Additionally, Weiffenbach constantly criticized Plaintiff for not following expense guidelines, while the males regularly exceeded the guidelines and were never criticized or even instructed to follow the guidelines. Further, though Mannheimer and Evangelist openly engaged in mutual hugs with Plaintiff, Weiffenbach never reprimanded the males or told them to stop. (R. 101, Mannheimer, 65-66).

3. *Plaintiff, Evangelist, And Mannheimer Were Similarly Situated*

To be "similarly situated," the "similarity between the compared employees must exist in all the relevant aspects of their respective employment circumstances." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (CA 6 1994). There was clearly a question of fact on this issue:

1. All three were hired within a six-month period in 1996 and reported to the same supervisor, Robert Weiffenbach;
2. All three were at the same hierarchical level in Alldata's "Special Accounts Group" as reflected in the Alldata Field Sales Organization Chart.
3. All three had previously worked as national sales reps for Alldata's competitor, the Mitchell Corporation, and had years of experience in the information industry. (R. 102, W, 100).
4. All three worked on national accounts (W, 115, Mannheimer, 60-61).
5. All three were provided with expense guidelines which, ostensibly, all were to follow (thus, "subject to the same standards").

Evangelist testified that he, Mannheimer, and Plaintiff were "peers"; made up a single national accounts "team" as they had at Mitchell; and that they each had the same job duties – "just in different market segments". (Evangelist, 20, 22, 24-26, 29). Terry Buschbach, a former Alldata sales rep, testified that the three were all at *"relatively the same level"* in the corporate hierarchy *because Weiffenbach "presented them to [him] that way,"* by indicating that he "had hired the three, that they would be working on national accounts and that I would be

supporting them as needed." (R. 100, Buschbach, 8-9) (emphasis added).

At the very least, the similarly situated issue was a question of fact for the jury. *See, e.g., Coleman-Nichols v. Tixon Corp.*, 203 Mich. App. 645, 652 (1994) ("While at this stage of the proceedings there may be some dispute regarding whether plaintiff and Gray were similarly situated [each supervised different departments], this is a factual question to be answered by the jury.")

E. Defendants Have Misstated The Law In Their Petition

In a desperate ploy to gain attention for their petition, Defendants have misstated the law. Moreover, the reason that Defendants did not receive a single vote for an *en banc* petition to the Sixth Circuit was because the legal holdings were unremarkable, and fit comfortably within the framework of prior precedent of both this Honorable Court and the Sixth Circuit.

The Defendants' first issue in the cert petition is based on two fatal flaws. First, Defendants allege that Plaintiff was an "admitted harasser", cert petition at 18, an assertion shown false by the above statement of facts. Second, Defendants argue that the mere assertion by an employer of a "good faith" belief that an employee has sexually harassed another employee, insulates a decision to discharge from any claim of discrimination. In fact, Defendants go so far as to allege, wrongly, that the decision by the Court of Appeals below was in conflict with decisions of every other U.S. Court of Appeals addressing such issues. The citations by Defendants, however, fail to support such an assertion.

Defendants first cite *Cronquist v. City of Minneapolis*, 237 F.3d 920 (CA 8 2001). *Cronquist* however, involved a

failure of a plaintiff to produce *sufficient evidence of pretext* to withstand a summary judgment motion. The Court conducted a pretext analysis, and the facts bore no resemblance whatsoever to the facts at bar. For example, the Eighth Circuit noted that nearly all of plaintiff's evidence was ". . . hearsay or double-hearsay opinions from non-decision-making officers or officials." 237 F.3d at 927. The Court ruled that such reliance could not be used to defeat a *motion for summary judgment*. The plaintiff in *Cronquist* also relied on "conjecture and surmise". *Id.* Such findings are a far cry from the record created by Plaintiff below, which not only directly challenged Defendants' cited reasons with admissible evidence, but also demonstrated, quite significantly, strong evidence of disparate treatment.

Moreover, *Cronquist* does not stray from a threshold review of the factual record to decide whether there is sufficient evidence of pretext. In *Cronquist*, such evidence was simply lacking. In the case at bar, both the District Court and the Court of Appeals found that Plaintiff had produced such evidence. Hence, at bar, Defendants are really complaining about how the jury resolved contested factual issues.

Defendants also cite *Waggoner v. City of Garland*, 987 F.2d 1160 (CA 5 1993). However, once again, review of the cited case fails to support Defendants' proposition. *Waggoner* also involved a failure to produce evidence. Plaintiff failed to provide any evidence that the employer had relied on such sexual harassment allegations in a "bad faith" pretext to discriminate. 987 F.2d at 1166.

Of course, the record at bar is replete with precisely the type of evidence missing in *Waggoner*. For example, the "delayed reaction" firing of Plaintiff, three months after the last incident, and only after a male replacement

inquired about a position; the decisionmaker's lies to the Human Resource representative Oberg about just learning of the incidents; and the ample evidence of disparate treatment, all serve to distinguish Plaintiff's case.

Obviously, each inquiry is fact-specific. In the case at bar, the district court repeatedly ruled that there were factual issues as to pretext. The Sixth Circuit affirmed only after an extensive review of the record, and, not a single judge of the Sixth Circuit voted for *en banc* consideration.

There clearly is no *per se* rule as Defendants suggest at p. 16 of their cert petition, *i.e.*, that once an employer *asserts* a belief of sexual harassment, the employer's motives are unassailable, and not subject to pretext proofs. Any such ruling would discard the well accepted framework for deciding such cases, and essentially grant immunity to employers from any discrimination suit once a mere allegation of harassment was leveled. Such a position finds no support in the law.

Each of the other cases cited by Defendants also turn on a lack of evidence to demonstrate pretext. *See O'Conner v. DePaul University*, 123 F.3d 665, 672 (CA 7 1997) (" . . . no evidence from which a rational jury might infer that Riggs lied about the reasons for his actions"). *Elrod v. Sears Roebuck*, 939 F.2d 1466, 1470-71 (CA 11 1991) ("no probative evidence to challenge" cited reasons for discharge; Plaintiff had signed report which admitted the harassment; and "no evidence" contradicted vindictive attitude towards complaining employees); *Sloan v. The Boeing Company*, 1997 WL 8868 (CA 10 1997) (*unpublished op*) ("Sloan failed to present any credible evidence on the issue of pretext.")

The reality is that there is no *per se* defense to a claim of discrimination that, once an employer *claims* a good

faith belief of harassment, the offending employee is stripped of civil rights, including the right to factually challenge the employer's cited reasons for discharge. Indeed, even Defendants have difficulty maintaining such a broadly and misstated assertion. Defendants cite this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), Cert petition at 14, for the proposition that, *in some instances*, while Plaintiff may have established a *prima facie* case, and set forth adequate evidence to reject an employer's explanation, " . . . *no rational fact finder could conclude that the action was discriminatory.*" Defendants cert petition at 14, citing *Reeves* at 148 (emphasis added).

The above citation destroys Defendants' own premise, because unless no "rational fact finder" could determine otherwise, the decision is one for the jury. The hotly contested facts in the case at bar, obvious from even a cursory comparison of the statements of the case, demonstrate, quite strikingly, how a rational fact finder could and did rule in Plaintiff's favor.

The Defendants are really trying to assert, as they did at oral argument in the Sixth Circuit, that the trial court below was faced with an *irrational jury*. However, the Defendants have omitted and misstated so many key and contested facts, that the actual record is unrecognizable from that suggested by Defendants.

Given the hotly contested facts, the *McDonnell-Douglas* paradigm, with its burden shifting analysis, was correctly applied. Defendants imply that the application of this doctrine, as set forth by the Sixth Circuit in *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (CA 6 1994), was somehow inconsistent with this Court's decision in *Reeves, supra*. Cert petition at 16. This is flatly wrong, and the two decisions are in harmony, because both place the

task of resolving factual issues regarding pretext before the fact finder.

Defendants also cite *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (CA 6 1997) and *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (CA 6 1994). Once again, Defendants' reliance is misplaced, and, upon analysis, such cases support the decisions below. Indeed, the Sixth Circuit precedent reflected by cases such as *Manzer*, *Kline* and *Pierce*, as well as the precedent of this Honorable Court in *Reeves* and *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993), demonstrate that the trial court's decisions were simply a straight-forward application of controlling precedent.

In *Kline*, the Sixth Circuit rejected a "pretext-plus" position, relying particularly on this Court's decision in *Hicks, supra*, 128 F.3d at 344. Hence, a plaintiff is not required to produce additional evidence of discrimination to prevail. *Id.* at 346. In instances in which a plaintiff has not factually challenged the reasons for discharge, some additional evidence of discrimination is required. *Id.* However, this rule is limited to cases in which plaintiff does not challenge the defendant's reasons for the discharge. *Id.* at 347.

In the case at bar, Plaintiff did factually challenge Defendants' stated reasons. By way of example only, Plaintiff questioned why her discharge happened months after Defendants had full knowledge of every alleged incident involving Plaintiff; why Weiffenbach obviously lied to Human Resources representative Oberg; why Weiffenbach lied as to the timing of Ed Maron's job inquiry; and why Weiffenbach actually solicited complaints from persons who had no intention of complaining.

Moreover, if additional evidence of discrimination was needed, the record was replete. Again, by way of

example only, Plaintiff, Defendants' only female salesperson, was hired at $25,000 less than two male counterparts hired in close proximity; Weiffenbach engaged in blatant disparate treatment; and Weiffenbach's history of lewd, offensive remarks toward women in general, as well as his sexist remark to Plaintiff (she was the reason he never re-married) were all before the jury. Enough said.

Next, Defendants misinterpret the holding of *Pierce*, in which the Plaintiff provided "no evidence" that the employer's reasons were a pretext for discrimination and the court found there was no triable issue of fact. 40 F.3d at 804-805. The Sixth Circuit still applied the well accepted paradigm to review whether there was any pretext evidence, and did not short-circuit the analysis by holding that a mere allegation of harassment means a plaintiff could never prove pretext, which is essentially what Defendants argue for in the cert petition.

Any ruling that a "good faith" belief, cert petition at 16, or "honest belief" *id.* at 19, should always "trump" a pretext analysis, once sexual harassment has been *alleged*, would totally disregard existing precedent. Given contested facts, the inquiry is for the fact finder. Only when no rational fact finder could find pretext, *Reeves* at 148, should the issue be foreclosed. There is no authority cited which establishes otherwise.

II. THE TRIAL COURT CORRECTLY REJECTED AN "HONEST BELIEF" INSTRUCTION WHICH WAS A MISSTATEMENT OF LAW AND CONFLICTED WITH MICHIGAN'S STANDARD JURY INSTRUCTION ON POINT

A. Standard Of Review

In *Innes v. Howell Corp.*, 76 F.3d 702 (CA 6 1996), the Sixth Circuit explained:

> The standard of review for jury instructions is that they are reviewed as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision. . . . The district court may be reversed *only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.*

Id. at 714 (emphasis added). Defendants have not met this burden.

B. Defendant's Proposed "Honest Belief" Instruction

Defendants' proposed instruction no. 15 addressed the Defendants' "honest belief" that Plaintiff was fired for engaging in "inappropriate conduct." This instruction was inappropriate because: (1) it was a misstatement of law as shown above; (2) Weiffenbach claimed Plaintiff was terminated for "sexual harassment," not "inappropriate conduct"; (3) the jury *did* receive Michigan SJI 2d 105.03, precluding it from substituting its own judgment for the Defendants' business judgment; (4) Defendants were still free to argue (and did argue) to the jury that Plaintiff's conduct violated Alldata's sexual harassment policy; (R. 93, TR 142-144); (5) the proposed instruction was argumentative; and (6) the standard jury instructions as to discrimination were given. (R. 93, argument, 148-153). [The SJI designed "to uniformly present juries in civil cases with clear, concise and unbiased instructions to guide their deliberations." *Socha v. Passino,* 405 Mich. 458, 467; 275 N.W.2d 243, 246 (1979).]

III. Defendants' Motion For Leave To Amend Answer Was Properly Denied By The Trial Court

Defendants' motion sought leave to add the affirmative defense of "after acquired evidence," based on the Plaintiff's alleged failure to return a company computer *after* she was terminated. Plaintiff flatly denied any such misconduct and testified that she had mailed the computer back to Alldata. (R. 13). Even if Defendant's allegations were accepted as true, however, the "after-acquired evidence" defense had no application.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879 (1995), the Supreme Court held that after-acquired evidence of a former employee's misconduct can limit potential damages. *Id.* at 361. In doing so, the *McKennon* Court made it clear that the question under the "after-acquired evidence" test is whether the alleged wrongdoing would have been a sufficient basis for the plaintiff's termination *if the "employer had known about it at the time of discharge." Id.* at 362 (emphasis added). Consequently, the doctrine could not possibly apply to a plaintiff's conduct occurring *after* discharge.

Indeed, all after-acquired evidence cases discovered by Plaintiff deal only with employee misconduct that occurred *prior* to the plaintiff's termination. *See, e.g., Horn v. State Dep't of Corrections*, 216 Mich. App. 58, 548 N.W.2d 660 (1996); *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (CA 3 1995); *Wright v. Restaurant Concept Management*, 210 Mich. App. 105, 532 N.W.2d 889 (1995); *Wehr v. Ryan's Family Steakhouses, Inc.*, 49 F.3d 1150 (CA 6 1995). The Defendants vainly try to argue that Plaintiff should have still been deemed an employee for a reasonable time after her discharge, but cite no authority to support such a stretch of existing precedent. (Cert. Petition at 23.)

Where a proposed amendment would be futile, leave to amend need not be granted. *See, e.g., Glick v. Koenig*, 766 F.2d 265, 268 (CA 5 1985); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

The trial court, in a well-reasoned opinion, denied Defendants' motion as futile. (R. 19).

CONCLUSION

Plaintiff respectfully requests that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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